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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE ENGLISH PROPERTY LEGISLATION OF 1922–6.

[*Contributed by* R. R. A. WALKER, ESQ., B.A., LL.B.]

I

Legislation Before the Reform Act.—For a period of nearly three hundred years before the passing of the Reform Act of 1832 the legislature played but a small part in the development of the land law. The age which saw the passing of the Statute of Uses (1535), the Statute of Enrolments (1535) and the Statute of Wills (1540) had witnessed a revolution in the theory and practice of property lawyers; but the new ideas then introduced were assimilated to the older doctrines of the common law and previous legislation, and upon a framework so constituted was woven by means of judicial interpretation the system which is enshrined in the pages of Blackstone. Such adaptation to changing social needs as took place was effected almost entirely by means of the doctrines developed in the Courts of Equity and the ingenuity displayed by conveyancers in carrying out the desires of their clients, the landowners.

There had been in these three hundred years a short time during which substantial reforms had been attempted: in common with most periods of political unrest the age of the Great Rebellion was one of constitutional and legal speculation and experiment. In December 1651 a committee, under the presidency of Sir Matthew Hale, was appointed to consider "how the mischiefs that grow from the delays, the chargeableness and the irregularities in the proceedings in the law may be prevented, and the speediest way to reform the same." The committee soon got to work; it sought the advice of the learned and suffered that of the enthusiastic,[1] and in a short time produced a noteworthy body of recommendations, which subsequent ages have gradually endorsed by adopting almost in

[1] "I often advised with some of this committee and none of them was more active in the business than Mr. Hugh Peters the minister, who understood little of the law, but was very opinionative." Whitelocke's *Memorials* (Ed. 1853), iii, 388. Peters had in June 1651 published a tract entitled *Good Work for a Good Magistrate* (Brit. Mus. E. 1364(2)), which advocated various reforms, including a general registry of alienations of land.

its entirety. Its proposals in the realm of the land law cover a wide field. In the words of Professor Holdsworth[1]:

Fines and recoveries were to be abolished. An ordinary conveyance by a tenant in tail was to be sufficient to bar the entail, and a conveyance by deed acknowledged was to be sufficient to pass the interest of a married woman. An heir liable to pay his ancestors' debts was no longer to escape liability by selling the land before action brought. Fines on the descent and alienation of copyholds were to be limited to one year's value of the land. Grantees of rents were to have a better remedy for their recovery, and notice of the grant to the tenant was substituted for attornment. Lands voluntarily conveyed were to be liable to all debts contracted before the conveyance. Provision was made for a system of country registers of conveyances and descents of land, and of incumbrances created upon it. Survivorship between joint tenants was to be abolished in the absence of a declaration to the contrary. Dower was to be capable of being barred by a declaration in the conveyance by which the husband acquired the land. Merger was to be prevented by a declaration to that effect. Collateral warranties were to have the same effect as lineal warranties. General occupancy was abolished, and the estate was to go to the heir, and be assets as if it were an estate in fee simple. The half-blood was to be admitted to succeed in default of heirs of the whole blood. Younger children were to have a third of their parent's real property, if they were neither advanced by the parent nor married with his consent, and if they had not acquired land by descent from the parent by local custom, nor been barred by the parent's declaration made before two witnesses or in writing.

The Rump and the ill-fated Barebones Parliament both considered and debated these recommendations, and, subsequently, attempts to work out reforms on similar lines frequently engaged the attention of the Protector and his Council.[2] Parliamentary opposition, however, and the pressure of other matters delayed legislation and the only reform actually carried out under the Commonwealth was the abolition of military tenure, together with its burdensome incidents, the value of which to the Crown has long been the only reason for the tenure's survival. This measure was confirmed at the Restoration by 12 Charles II, c. 24, but the other proposals were laid aside—most of them to emerge again triumphant in the nineteenth and twentieth centuries.

Work of Various Commissions.—The second quarter of the nineteenth century saw the turn of the tide. Blackstone's great exposi-

[1] Holdsworth's *History of English Law* (3rd Ed.), vi, 416–17. The proposals of the committee can be found in the Somers Tracts, vi, 177–245.

[2] See, *e.g.*, *Calendar of State Papers Domestic* (1654) 281; (1655–6) 169, 340–1; and Clarke Papers (Camden Society, 1899), iii, 61, 76.

tion of the law had been in the eyes of some a great exposure ; and Bentham's genius was soon engaged in applying to archaic legal rules an acid test of utility which they were unable to satisfy. In 1829 comes the first of a series of reports by Royal Commissions appointed to consider the law of real property in various aspects with a view to its improvement.[1] The optimism of the commissioners of 1829 was in keeping with current political sentiments.

> We have the satisfaction to report (they say) that the law of Real Property seems to us to require very few essential alterations ; and that those which we shall feel it our duty to suggest are chiefly modal. When the object of transactions respecting land is accomplished, and the estates and interests in it which are recognized are actually created and secured, the law of England, except in a few comparatively unimportant particulars, appears to come almost as near to perfection as can be expected in any human institutions.

To their minds, the chief defect lay in the means by which estates and interests in real property were created and transferred : conveyancing was expensive and dilatory, and titles insecure. The remedy proposed in the report of 1830 was a general registry of deeds. A proposal of this sort had formed part of the schemes advocated during the Commonwealth, and it had never been allowed to fall into the same depths of oblivion that had hidden some of the other proposals.[2] To a number of the reformers it seemed that the golden age was at hand. The movement in favour of registration grew and registration of title displaced registration of conveyances in general esteem.[3] But the panacea had not been found, and legislative attempts in 1862 and 1875 to establish a voluntary system of registration of title proved a disappointment to their

[1] 1st, 2nd, 3rd and 4th Reports of Real Property Commissioners, issued respectively 1829, 1830, 1832 and 1833 ; Report of the Registration and Conveyancing Commission, 1850 ; Report of the Land Transfer and Registration Commission, 1857 ; Report of the Land Transfer and Registration Commission, 1870 ; Report of a select committee of House of Commons on Land Transfer, 1879. This last report is important as recommending the changes effected by the Statutes of 1881–97 and foreshadowing part of the legislation of 1922–6.

[2] For a history of the attempts to introduce systems of registration in the seventeenth and eighteenth centuries, see Report of the Commission on Registration and Conveyancing, 1850, Appendix VI, 232 *et seq.*, and the bibliography prefixed to R. B. Morris's *Summary of the Law of Land and Mortgage Registration* (1895).

[3] It may be noticed that the Reports of 1850, 1857 and 1870 all follow the Report of 1830 in advocating a form of registration as the remedy for the complications of land transfer. " These four reports . . . constitute a crescendo movement in favour of registration of title as against registration of assurances." J. E. Hogg's *Ownership and Incumbrance of Registered Land* (1906), which gives a good account of the genesis of the Land Transfer Act of 1875 and *cf.* Morris, *op. cit.*, 5–34.

authors. It became evident to learned opinion [1] that the proposed short cut upon which the majority of reformers had concentrated since the report of 1830 was impracticable so long as the foundations of real property law and conveyancing practice remained so intricate. Simplification and standardization of the substantive principles of the law was seen to be an essential prelude to an effective simplification of dealings in land.

The work of the various Commissions, however, focused attention on the problem of reform. To the recommendations of the Real Property Commissioners were due the Prescription Act (1832), the Real Property Limitation Act (1833), the Administration of Estates Act (1833), the Dower Act (1833), the Inheritance Act (1833) and the Wills Act (1837). The legislative stream thus started flowed on all through the nineteenth century. The disentailing assurance and the modern deed of grant were substituted for the cumbrous fictions and forms which had long fettered the transfer of land. The position of married women, infants and lunatics in relation to property was greatly improved, mostly by the statutory establishment of doctrines which had been developed in the Courts of Equity. The advantages which the law inequitably gave to an heir at the expense of the next of kin was lessened by the cutting down of the preference given to real over personal estate in administration, and by the mitigation, by the Intestates' Estates Act of 1890, of a serious abuse arising from the rules relating to devolution on intestacy. Machinery was provided for the facilitation of partition of land not held in severalty, and also for the compulsory enfranchisement of copyholds at the suit of either the lord or the tenant. But the reforms effected, if they cover a wide field, do not penetrate far below the surface. Although many archaisms and anomalies were abolished, the substantive land law remained a system appropriate to a state of society which was passing away, and as the change in social, political and economic conditions was accelerated the need for alterations in the law became more urgent.

Statutory Reforms of Last Fifty Years.—Although in the nineteenth century the day of the "root and branch" men had not arrived,

[1] *Cf.* "Simplification of Title to Land preferable to the Introduction of Novel Modes of Assurance, with an Outline of a Plan," by E. P. Wolstenholme, *Juridical Society Papers*, ii, 533; "On the True Remedies for the Evils which Affect the Transfer of Land," by Joshua Williams, *ibid.*, ii, 589; "The Law of Real Property," by F. W. Maitland, *Collected Papers*, i, 162. The first two of these papers mark the beginning of the modern movement and contain the germ of much of the legislation of 1922–6. Maitland's characteristic article appeared originally in the *Westminster Review* of 1879 and is addressed primarily to the layman.

the work of reform was advanced, and advanced along a path on which it has not had to retrace its steps, by several statutes which are of great importance for our present purpose, since they form the basis of the consolidating legislation of 1922–6. The Conveyancing Acts of 1881 to 1911 and the Vendor and Purchaser Act of 1874—aided perhaps by the Solicitors' Remuneration Act of 1881—had the effect of considerably reducing the length of conveyancing instruments and contracts. The length of title to be adduced on an open contract was shortened; the burdens imposed by the doctrine of constructive notice were mitigated; implied statutory covenants were introduced to take the place of the old prolix forms which may be found on page after page of the earlier precedent books; statutory conditions of sale with regard to title and other matters were made applicable to all contracts unless expressly excluded; and trustees, mortgagees and attorneys were given various powers which had long been inserted as common form in well-drawn instruments. A series of Trustee Acts culminating in that of 1893 defined the rights, duties, powers and liabilities of trustees: by means of their provisions, trust estates were saved much unnecessary expense and trustees were relieved from some of the heavy burdens which the Courts of Equity had gradually laid upon their shoulders. By a number of miscellaneous enactments brought together by the Land Charges Registration and Searches Act of 1888, which was amended by the Land Charges Act of 1900, provision was made for the registration at the Land Registry of writs and orders affecting land, deeds of arrangement and other charges permitted by the law, but not appearing on any of the title-deeds, and protection was given to purchasers of land in respect of any such liabilities which were allowed by the chargee to remain unregistered. The Settled Land Acts of 1882–90, replacing the earlier Settled Estates Act, were directed against the evil which had been caused by the extensive custom of settling land in strict settlement. A strict settlement which, as was frequently the case, contained no powers of sale exchange or partition, nor any power to open mines or to carry out repairs at the expense of the estate, was totally unadapted to the age which experienced the changes brought about successively by the industrial revolution, the building of the railways, and the beginnings of modern taxation. The remedy adopted by these Statutes was to extend, within certain limits, to life tenants and others in a like position the powers of sale, leasing and management which are enjoyed by an owner in fee simple, and at the same time

to guard the interests of the persons entitled in remainder by transferring the trusts of the settlement to the proceeds of any sale, which proceeds were to be paid into Court or to trustees, and not to the tenant for life. The Land Transfer Act of 1897, following on the unsuccessful voluntary acts of 1862 and 1875, established a system of compulsory registration within a limited area. It also effected a simplification in administration by vesting the realty of a deceased person in the first place in his personal representative who was to hold it, subject to debts and funeral and testamentary expenses, upon trust for the heir or devisee.

So much for the statutory reforms of the last fifty years.[1] But even when we take them into account the fact remains that the land law underwent very little essential modification. A purchaser or a mortgagee—and it is through his eyes that we can best view the practical efficiency of a system of land law—might still be subjected to vexatious delays and met with a formidable bill of costs. He had, with the necessarily expensive assistance of an expert in legal antiquities, to satisfy himself that the vendor or mortgagor was able, either alone or with the concurrence of various other persons having legal or equitable interests in the property, to convey according to his contract. It is not suggested that the law could ever be so simplified that the man in the street might, with safety, become his own conveyancer; but the position was such that a vast mass of highly technical and often quite illogical learning was essential to a practitioner who was called upon to investigate a title. The War, which emphasized the changes which have been going on in our social system during the last and the present generations, served to bring matters to a head.

Legislation Resulting in the Property Laws of 1922–6.—The scheme[2] which resulted in the legislation of 1922–6 made its first parliamentary appearance in the form of Mr. Wolstenholme's Conveyancing Bill of 1897, but such time as the legislature was then willing to give to law reform was taken up by Lord Halsbury's Land Transfer Bill of the same year. A Royal Commission, which was appointed in 1908, reported in 1911, and although it is primarily concerned with registration, its report and the evidence laid before it have some

[1] Professor Holdsworth's article "The Reform of the Land Law: an Historical Retrospect," in the *Law Quarterly Review*, xlii, 158, of which I have made frequent use, is an excellent historical introduction to the new legislation.

[2] For an account of the different Bills and their history see Prideaux's *Conveyancing* (22nd Ed.), i, 1–3, and J. H. Johnson's Bibliography of the New Property Acts (Annotated), 1896–1925, in *L.Q.R.*, xli, 67.

bearing on more general reforms. In 1913 Lord Haldane's committee took up the wider question, and two Bills were introduced in Parliament, a Conveyancing Bill which adopted with modifications the plan of the 1897 Bill, and a Real Property Bill which proposed the abolition of copyhold tenure and the enactment of many of the miscellaneous alterations of the law which have been carried out by the new legislation, as well as the amendment of the provisions of the Settled Land Acts and the Land Transfer Acts. In 1914 the two Bills were consolidated and then the War put an end to any further progress for the time being. In 1919 a committee under the presidency of Sir Leslie Scott took up the work, and in 1921 the first Law of Property Bill was introduced by Lord Birkenhead. This measure, which became the Act of 1922, was never intended to come into operation; it was amended in 1924, and the two Acts form the basis of the six consolidating Statutes which came into operation on January 1, 1926—the Law of Property Act, 1925, the Administration of Estates Act, 1925, the Settled Land Act, 1925, the Trustee Act, 1925, the Land Charges Act, 1925 and the Land Registration Act, 1925. The Acts of 1922 and 1924 were wholly repealed except for the provisions, which are of a temporary nature, dealing with copyhold and customary estates and perpetually renewable leaseholds. In the short space of time that has elapsed since the commencement of the six Acts, two more have been passed which amend or replace some of the original provisions—the Supreme Court of Judicature (Consolidation) Act, 1925, and the Law of Property (Amendment) Act, 1926.

Objects of the Act of 1922.—The preamble of the parent act of 1922 gives a clue to the way in which the problems have been tackled. It is entitled "An Act to assimilate and amend the law of Real and Personal Estate, to abolish copyhold and other special tenures, to amend the law relating to commonable lands and of intestacy, and to amend the Wills Act, 1837, the Settled Land Acts, 1882 to 1890, the Conveyancing Acts, 1881 to 1911, the Trustee Act, 1893 and the Land Transfer Acts, 1875 and 1897." The object of the legislation is to facilitate and cheapen dealings in land and to make them, so far as the subject-matter of the transactions admits, as simple as dealings in stocks and shares; and this object is sought to be attained by development of the principles contained in the Statutes of the last part of the nineteenth century, which we have considered above, and by the assimilation of real and personal property in regard to their legal incidents. Such assimila-

tion had already been going on over a long period, and the rules of personal property which governed terms of years had in part supplanted the more rigid and technical provisions of real property law. The displacement of the old real actions by the action of ejectment, the gradual elimination of the consequences of tenure and the making of both forms of property in land available for creditors are examples of this tendency: the appointment by the Land Transfer Act of 1897 of a real representative upon whom the freehold land of a deceased person was to descend in the first instance is another important step in the direction which the new legislation has followed. For the most part the old rules affecting personal property have been applied to realty; thus the rules relating to the creation of remainders, the magical efficacy of words of limitation and the doctrines of Shelley's Case and *Whitby v. Mitchell* have passed with other mysteries of the old real property law into the realms of history. In a few cases doctrines previously applicable only to realty have been extended to personalty, and in some, as for instance the rules relating to devolution on intestacy, an entirely new code has been established and applied to both kinds of property alike.

Main Problem and its Solution.—It is proposed to examine in greater detail in a further paper some of the provisions of the new legislation. Here it will be sufficient to indicate briefly the main problem which was awaiting solution and the lines along which that solution has, it is hoped, been found. The law relating to land and consequently the task of making title was affected by complications which may conveniently be summarized under three heads:

1. There existed side by side two forms of tenure, socage and copyhold; and in addition land might be subject to various local customary rights, such as gavelkind and borough English. Moreover, there was a distinction between freeholds and leaseholds, the latter ranking as chattels real and being subject in most respects to the law affecting personal property, while the former were governed by the feudal rules of real property law. In the result there were three land laws instead of one.[1]

2. A large number of successive and concurrent estates might exist in the same piece of land and, what is important, might all be material to a purchaser seeking to get a clear title to the fee simple.

3. The Courts of Equity had built up an onerous doctrine

[1] It was possible to imagine the case of a man owning land, parcels of which would descend upon his death intestate in twelve different ways. See Pollock and Maitland's *History of English Law* (Ed. 1911), ii, 256.

of notice which, although modified by the Conveyancing Act of 1882, involved a load of obscure learning and necessitated highly technical drafting of conveyancing instruments and sometimes elaborate investigations into beneficial interests.

The first of these evils is remedied by the abolition of copyhold tenure, all customary modes of descent, perpetually renewable leases and leases for lives and by the drawing together of the law of freeholds and the law of leaseholds.

Copyhold Tenure.—In spite of the value of copyhold tenure as a form of registration of title by private enterprise and of its sentimental value as an historical link with the Middle Ages, it has long been realized that its continued existence, together with that of local customary rights, was one of the chief obstacles to simplification of the land law. The plan which has been adopted is that which was employed by the Lands Clauses Consolidation Acts in cases where a company was authorized to acquire copyhold lands by compulsory purchase. Copyhold lands, including copyholds for life or for years when the tenant has by custom a perpetual right of renewal, were vested on January 1, 1926, in the former copyholder for an estate in fee simple, subject during a preliminary period of ten years to certain manorial incidents having a pecuniary value. During this period such incidents may be abolished by agreement between the parties or subject to compensation fixed by the Minister of Agriculture upon notice given by either party to the other. At the end of ten years the incidents cease automatically, but still subject to compensation to be fixed by the Minister if claimed within a further period of five years. The practice of granting perpetually renewable leases and leases for lives which was common in some parts of the country was expensive and served no useful purpose. Such leases are now abolished, as are the local customary rights of which gavelkind and borough English are the most important.

Freeholds and Leaseholds.—Copyhold tenure being thus converted into common socage, it remained to effect a unification of the legal rules affecting freeholds and leaseholds. The chief alterations made with this object are the placing of both kinds of property in land on the same footing with regard to the priority of equitable assignees and the payment of debts in administration, and the setting up of one code of intestate succession and one mode of effecting mortgages applicable alike to both. These matters will be considered later: speaking generally, the chief effect of the new code

of intestate succession is the disinheritance of that spoilt child of the old real property law, the heir, and a complete equality of the sexes. Under the new law mortgages are to be effected by demise, or in the case of leaseholds by sub-demise, or by a charge having by statute the same effect, the mortgagor retaining his legal estate in the fee simple or the head term and the mortgagee taking a term of years or sub-term with power to convey the whole interest of the mortgagor when selling under his power of sale.

Legal Estates.—The multiplicity of successive and concurrent estates and the complications attendant upon the equitable doctrine of notice are dealt with as follows : legal estates, which incidentally can no longer be held in undivided shares, are cut down to two in number, the fee simple and the term of years absolute. All other interests are made equitable only and take effect as trusts. The legal estate fronts the world, and with the beneficial interests which are hidden behind it the world is to be as little concerned as possible. The policy of the new legislation is to provide that wherever possible there shall be a person of full age capable of transferring the whole estate in the property to a purchaser, and that such conveyance or an act in the law having by statute the same effect—as, for instance, a vesting order—shall be the only means by which the property can be transferred during his lifetime. Provision is made for overreaching of the majority of equitable interests on a sale so that a purchaser is not concerned to investigate them. This is done by two means, either under the powers of the Settled Land Act, 1925, or under an express or statutory trust for sale. The Settled Land Act, 1925, adopts and extends the principles of the Settled Land Acts, 1882–90, which we have already noticed, namely, that subject to proper safeguards for the remaindermen, the tenant for life or other statutory owner of full age shall be in approximately the same position as an absolute owner. Under those acts, however, a purchaser had to satisfy himself that the land was settled land, that his vendor really was the tenant for life, and that there existed properly constituted trustees for the purposes of the acts to whom he could pay his purchase money, and to do this he had to investigate the settlement or string of settlements under which the property was held. By the scheme of the Settled Land Act, 1925, the fee simple in the land is vested in the tenant for life or other limited owner for the time being. The trusts of the settlement are kept off the title by being contained in a separate trust deed, while the legal estate is conveyed to the tenant for life

for the time being by means of a vesting deed or vesting assent, which also states the names of the trustees to whom the purchase money is to be paid, and which alone appears on the vendor's abstract of title.

The Trust for Sale.—The trust for sale is a device well known to conveyancers and one which was frequently used both in wills and in settlements *inter vivos*. In testamentary dispositions its employment can be traced back at least five hundred years.[1] The fund created by a trust to sell all or part of a testator's real estate facilitated the division of his property amongst his beneficiaries, and could also be made by him to bear part of the burden which would otherwise have fallen upon his personalty, and so impoverished the next of kin at the expense of the heir. The imposing body of reported cases involving the equitable doctrines of conversion and reconversion shows how frequent use was made of the testamentary trust for sale. In settlements *inter vivos* the same device was used to enable the trusts of an ordinary personalty settlement to be declared where the trust property consisted of real estate. Thus when a successful trader wished to settle real property upon himself for life, with remainder to his widow for life, and then to provide for an equal division of the trust estate amongst his children he would do so by means of a conveyance to trustees upon trust for sale, and the declaration, by a separate instrument, of trusts of the proceeds of such sale, thereby keeping the trusts of the settlement off the title to the land. In a strict settlement the primary object is to keep the land in the family and make it descend from eldest son to eldest son, subject to charges for portions in favour of the younger children ; in the trader's settlement the land is really only a form of investment of the trust estate and equality of division amongst the beneficiaries without the difficulties of a partition of the land is the settlor's chief aim. This form of settlement seems to have come into use about the middle of the nineteenth century, at a time when the commercial community was growing in importance, and the desire to establish a landed family was ceasing to captivate every new possessor of wealth.

In either case, when a sale is made under the powers of the Settled Land Act or under a trust for sale, the trusts affecting the land are transferred to the proceeds of sale, which will be in the hands of trustees. There are, however, certain equitable interests

[1] The history of the trust for sale is traced by J. M. Lightwood in an article in the *Cambridge Law Journal*, iii, 62.

which cannot be overreached where a purchaser has notice of them. This disadvantage from the point of view of a purchaser is not so great as it might seem : in the first place, the doctrine of constructive notice, as modified by the Conveyancing Act of 1882, is further restricted by the period of title being reduced from forty to thirty years, and secondly the system of land charges registration which we have noticed above in connexion with the Land Charges Acts of 1888 and 1900 is greatly extended by the Land Charges Act, 1925, and it is enacted that a purchaser shall not be affected with notice of anything capable of registration under that Act which is unenforceable against him by reason of its non-registration.

Land Charges Act of 1925.—The result of the Land Charges Act of 1925 [1] is in effect the establishment of a register of third party rights, particularly of those which do not appear by a perusal of the abstract of title or on an examination of the property. Protection is afforded to the owner of such interests, and purchasers and their advisers will find that a considerable saving of their time and trouble is also effected. There are two particularly noteworthy extensions of the land charges principle. A purchaser of a legal estate is not to be concerned with the duties that became payable upon the death of a former owner, unless the claim for duty is registered as a land charge, nor is he to be liable in respect of a former owner's bankruptcy, unless it has been registered as a *lis pendens* or a receiving order has been registered as an order affecting land. These provisions will simplify inquiries which have in the past often proved very burdensome.

Legal Estate in Land Indivisible.—The legal estate in land is now one whole and cannot be divided either vertically or horizontally. For instance, the undivided share, that fruitful source of lengthy abstracts and complicated conveyances, can no longer exist in a legal estate. Land which would have been vested in A and B as tenants in common is now held by them upon trust for sale with a trust of the proceeds for themselves as tenants in common. Similarly life interests, entailed interests, and future, determinable or conditional interests can still exist, but only in equity. The Statute of Uses is repealed and executory interests become, as they were before the passing of the Statute, equitable. A purchaser of land subject to any such interest deals with and takes his conveyance from the estate owner—that is, the person in whom the legal estate

[1] *Cf.* J. S. Stewart Wallace's "The Land Charges Acts in Jurisprudence," *L.Q.R.*, xli, 176.

is vested upon trust to give effect to any equitable interests which may exist. The simplification and shortening of dealings in land, therefore, is brought about by means of old devices, the Settled Land Act powers and the trust for sale; these principles, however, are greatly extended, first by the creation of statutory trusts for sale, as in the case of a tenancy in common, and secondly by the power, which is conferred on an estate owner of land subject to equitable interests, of creating a settlement or a trust for sale for the express purpose of overreaching those equitable interests and conveying the land to a purchaser discharged from them. This extension of the "curtain" principle of shifting equitable interests from the land to the proceeds of sale is of great importance, but it should be remembered that there are certain cases to which it does not extend. A contract for sale cannot be overreached, and rightly; nor can restrictive covenants and equitable easements, since they are interests which cannot subsist in the proceeds of a sale; nor, again, can either interests protected by a deposit of documents or those registered under the Land Charges Act be overreached by a special trust for sale or a special settlement.

Registration.—The legislation does not attempt to extend the system of registration beyond the point which it had reached in 1897. The Land Registration Act of 1925 brings it into line with the scheme of the new law, and for the next ten years the two systems, that of private conveyancing under the new law and that of registration of title, will run side by side and their respective merits will doubtless be carefully compared. Without registration of title some form of private investigation is essential, but those who oppose the extension of the system claim that under the new law such investigation will be cheaper and more expeditious than dealings at the Land Registry, and that it will be so reliable as to make of little account the lack of the State guarantee of title which is given under the system of registration.

THE CODIFICATION OF THE CANON LAW.[1]

[*Contributed by the* Rev. A. Keogh, S.J.]

First Attempts at Codification.—Those bishops who at the Vatican Council in 1870 asked the Pope, Pius IX, for the codification of the canon law gave expression to a widely felt need. The last official attempts at the codification of the canon law had been made in the Middle Ages. They had been preceded by an unofficial attempt seen in the work of Gratian, a Camaldolese monk of Bologna who died before 1179. The probable date of publication was after 1139 and before 1150. The title given to his work by Gratian was *Concordia Discordantium Canonum*. It was an attempt to give a consistent statement of the canon law in spite of many real or apparent inconsistencies. In the course of time the work was commonly known as the *Decretum Gratiani*. It was based on the collections of canon law already made, genuine and spurious, and argued to general conclusions from laws which bound only particular churches as well as from those which bound the whole Church. In spite of the great use made of the *Decretum* in the law schools and of the respect with which it was treated, Gratian's work was never declared authentic, *i.e.* officially authoritative. It was and remained a private work. No statements of Gratian—the *Dicta* or *Summaria* —had greater authority than the source from which they were derived, that is, only those statements of the law which were rightly based on a general law or had been officially accepted as such had universal application. This was the position even when the *Decretum* was included in the official edition of the *Corpus Juris Canonici* published by Pope Gregory XIII in 1580.[2]

[1] *Codex Juris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus, præfatione fontium annotatione et indice Analytico-alphabetico ab Emo Patro Card. Gasparri auctus. Romæ Typis Polyglottis Vaticanis.*

The Code of Canon Law is published in 8vo, 12mo and 18mo. The 12mo and 18mo editions are also published without the references to former legislation which are contained in the *fontium annotatio*. The most handy edition for the student is that in 12mo *cum fontium annotatione*. This edition is 19½ centimetres long and 12 broad, contains xlviii + 932 pages and costs in paper covers from the Tipographia Poliglotta Vaticana, Rome, 22.50 lire, post free.

[2] *Cf.* J. A. Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis zur Gegenwart*, i, pp. 46 ff.; F. X. Wernz, S.J., *Jus Decretalium*, i, pp. 344 ff.

It is quite likely that Gratian's private attempt prepared the way for the first official codification of the canon law. This is to be found in what came to be called the *Decretales Gregorii IX*, which were promulgated by his "constitution" *Rex Pacificus* of 1234.[1] The method followed was to use five collections or *compilationes* of canons of councils, constitutions and decretals of popes which had been put together by various hands in the time following the publication of the Decree of Gratian. Two of these containing decretals respectively of Innocent III and Honorius III were authoritative and exclusive and had been made binding everywhere. The same is probably true of another collection containing the later decretals of Innocent III and the canons of the fourth Lateran Council of 1215. To these were added other decretals, *e.g.* of Innocent III, which had not found their way into the *Compilationes Antiquæ*, decretals already issued by Gregory IX, and decisions specially given by him for this work in matters which still required determining. The agent of Gregory IX in making this collection was Raymund of Pennafort, a Dominican friar who was his chaplain and penitentiary. The *Decretals* of Gregory IX on their promulgation became an authoritative code of law binding the whole Church. This code not merely repeated the canons of general councils and the constitutions of popes which had universal application, but often converted, *e.g.* canons of provincial councils and papal decretals issued to settle particular cases into general laws. On the other hand, general laws up to then in force were abrogated in those cases where they were not in agreement with the laws contained in the new collection. The result was that in very many cases a decision given by a pope in a particular case was made by Gregory IX the general law for similar cases. This had been the practice of the courts and had been explicitly asserted in the case of the *Decretals* of Innocent III and Honorius III. The principle was now given an authoritative general application, with the advantage that the canon lawyer knew what decretals he had to take into account instead of hesitating about the force of particular texts, or being in doubt as to which of two contradictory texts he was to follow.[2]

The order followed in this code was that used by Bernard of

[1] *Cf.* the text of the *Rex Pacificus* at the beginning of the second volume of E. Friedberg's edition of the *Corpus Juris Canonici* (Leipzig, 1881) or Wernz *Jus Decretalium*, i, p. 354.

[2] *Cf.* Wernz, *Jus Decretalium*, i, pp. 354–7, or Schulte, *Geschichte*, etc., ii, pp. 3–15.

Pavia (Papiensis) in his *Breviarium Extravagantium*. This was a collection of law texts not to be found in the *Decretum Gratiani* (hence styled *extra* [*Decretum*] *Vagantes*), which was put together between 1187 and 1191. These texts were divided into five books, each book into titles, each title into chapters. The arrangement of the material of the five books was so described by Bernard as to produce the verse "*iudex, iudicium, clerus, connubia, crimen.*" [1]

The next official codification of the canon law was that of Pope Boniface VIII in 1298. This was called the *Liber Sextus*, because it was to be considered the continuation of the five books of the *Decretals* of Gregory IX. It contained principally the decretals and constitutions of Boniface VIII: they fill 229 out of 359 chapters; the rest are taken from the decretals issued between 1234 and the beginning of his pontificate. Of these there were four authentic collections, two of the decretals of Innocent IV (1243–54) and two published respectively by Gregory X (1274) and Nicholas III (1280).[2] In most cases the *Liber Sextus* added new laws to those contained in the *Decretals* of Gregory IX; in some cases it abrogated laws contained in that or the subsequent compilations.

A similar authoritative addition to and correction of the preceding general law was begun by Clement V and carried out by his successor John XXII in 1317. It was given the name of the "*Clementinæ*." These, however, had not the exclusive force of the *Decretals* of Gregory IX or the *Liber Sextus*, as genuine decretals issued after the *Liber Sextus*, and not inserted in the *Clementinæ*, still kept their original force.[3]

Two other collections of decretals which are found in the *Corpus Juris Canonici* of Gregory XIII, viz., the *Extravagantes* of John XXII and the *Extravagantes Communes*, were put together by private individuals, were never authoritatively promulgated, and so simply kept the force they had originally even though they found a place in the officially published *Corpus Juris Canonici* of 1580.[4] As will have been seen, the only compilation that could strictly be called a code was the *Decretals* of Gregory IX, which had as supplements the *Liber Sextus* and the *Clementinæ*. These latter, however, in some cases abrogated laws contained in the code of Gregory IX.

For long after the *Clementinæ* no attempt was made authorita-

[1] *Cf.* Schulte, *Geschichte*, i, pp. 78 ff., or Wernz, i, p. 351.
[2] *Cf.* Schulte, *Geschichte*, ii, pp. 34–44, or Wernz, i, pp. 359–60.
[3] *Cf.* Schulte, *Geschichte*, ii, pp. 45–50, or Wernz, i, pp. 361–2.
[4] *Cf.* Schulte, *Geschichte*, ii, pp. 50 ff., or Wernz, i, p. 363.

tively to codify the law of the Church. New papal and conciliar laws were made in the fifteenth century. Then came the Council of Trent (1545–63) with its many disciplinary laws. Gregory XIII in 1580 expressed a wish to put together an authentic compilation of the canons of councils and papal decretals which had been made from the time of the publication of the *Clementinæ* up to the end of the Council of Trent. The work was pushed forward by Sixtus V. In 1598 the work was ready, arranged in the customary five books with the title of *Sanctissimi D. N. D. Clementis PP. VIII Decretales.* But Clement VIII refused his approval to the work. The materials used came from the Council of Florence (1438–45), the fifth Lateran Council (1512–17), the Council of Trent and the decretals of twenty-eight popes, the earliest being one of Gregory IX, the latest some of Clement VIII. A revision of the work made in the years 1607–8 failed to secure the approbation of Paul V. The reasons for this refusal were not made public. It is generally conjectured that the refusal was due to fear of conflict with those kingdoms which did not receive some of the decrees of councils and papal constitutions contained in the book. Other reasons given are the preponderance in the work of matters touching dogma and the omission of many legal points that might well have been dealt with.[1]

To the mass of uncodified legislation of the fifteenth and sixteenth centuries were added the papal constitutions of the following centuries and the decrees of the Roman Congregations founded by Sixtus V in 1587.[2] It is true that collections of papal constitutions—*Bullaria*—were formed. Of these, however, only that of Benedict XIV published in 1746 was authoritative. To these have been added in more recent times the unofficial *Acta Gregorii XVI*, *Acta Pii IX* and the *Acta Leonis XIII*. Further, four of the Roman Congregations have published official collections of their decrees. That of the Congregation of the Council, instituted to interpret and enforce the disciplinary laws of the Council of Trent, opens with the decrees of the year 1718 and runs to more than 150 volumes. The collections of decrees of the Congregation *de propaganda fide* and of the Congregations of Rites and Indulgences are more manageable.

It will be evident that it was extremely difficult in many cases for anyone to get at the law texts themselves. In practice much use was made of works of canon lawyers in which an orderly and full

[1] *Cf.* Schulte, *Geschichte*, iii, pp. 71–4, or Wernz, i, p. 378.

[2] The congregations are the counterpart of the ministries in a civil state.

statement of the law in force, duly supported by texts and references, could generally be found.[1]

Pius X's Proposed Code of Canon Law.—This being the state of things, it is not to be wondered at that the bishops present at the Vatican Council, besides asking for various modifications of the canon law, also expressed a desire for its codification, so that the difficulty arising from the existence of "innumerable laws," among which were contained many that were unknown or repealed, others obsolete, or impossible or very difficult to observe, might be done away with, and the new laws needed to meet changed circumstances be made.[2]

The work was set on foot by Pius X when he issued the *Motu Proprio "Arduum sane"* of March 17, 1904. The object of the proposed Code of canon law was said to be to draw up a clear statement of the general laws of the Church, to set aside what was obsolete or abrogated and to find a place for new laws adapted to the times. By a letter of March 25 of the same year the Catholic archbishops of the world were asked to consult the bishops of their provinces and then to send to the Holy See a list of the changes in the existing law they thought desirable. The bishops of each nation were invited to choose a canonist to join the group of canonists to be appointed in Rome, or they might choose one of that group to represent their views or at the least they might appoint a canonist who should by letter keep in touch with the Roman group.[3]

On April 6, 1904, a letter was sent to the Catholic Universities asking for the names of the professors of canon law who would be willing to help. It was stated that it had been decided to draw up canons or articles like those of the modern codes of civil law. The order in which it was proposed to arrange the canons was made

[1] Probably the most outstanding work on the whole of the church law, with the exception of the liturgical law, that came out in the period immediately preceding the Code is the *Jus Decretalium* in six volumes of F. X. Wernz, S.J. (Rome, 1898 ff.). Fr. Wernz was for a long time one of the professors of the advanced course of canon law at the Gregorian University and had much experience as consultor or expert adviser of some of the Roman Congregations. His work, which shows great erudition, deals with the history of the institution of law with which he is concerned, and then goes on to lay down as accurately as possible the *ius vigens*. The text of the work is extremely concise. One has to turn to the notes for discussion and elucidation of points. A new edition of the *Jus Decretalium* based on the Code is in course of publication (*Jus Canonicum ad Notmam Codicis exactum*, Wernz-Vidal, Università Gregoriana, Rome).

[2] Cf. *Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis*, vol. v, pp. 825, 826, 840, 874, 879, 882, 889 (Freiburg im Breisgau, 1890).

[3] *Cf.* the *Præfatio of the Code* (12mo edition), pp. xxxvi–xxxvii.

known. Those canonists willing to help were asked to say what part of the canon law they wished to take in hand.

In accordance with the *Motu Proprio "Arduum sane,"* Pius X set up a Committee of Cardinals to supervise the work of codification. They were to weigh, and then report to the Pope on the work done by the canonists chosen to help. The first Committee of Cardinals was, in the interests of quicker work, soon supplanted by a smaller committee of six. Of this committee Cardinal Gasparri was made secretary. To him more than any other the carrying out of Pope Pius X's purpose is due. He himself, in the preface to the Code, tells how the work was done. The first care of the Committee of Cardinals was to appoint a body of canonists chosen from the officials of the Curia and from the religious orders, both Italians and men of other nations. Of this body of experts Cardinal Gasparri was made president by the Pope. They were divided into two groups. Helped by canonists outside Rome, they set to work to draw up the required canons in the part allotted to them, taking into account the proposals sent in by the bishops of the world. The following rules were laid down for their guidance:

1. The Code was to contain only disciplinary laws.

2. The canonists working at the Code were to take their material from the *Corpus Juris Canonici,* the Council of Trent, the constitutions of the popes and from the decrees of the Roman Congregations, but were to leave aside all that was obsolete or repealed. They were to draw up canons which should give a clear statement of the law and nothing else, and in such a way that the canon might be divided into paragraphs, if that were thought desirable.

3. The words of the source from which the canon was taken were to be quoted in the canon as far as brevity and clearness allowed. At the same time an exact reference to the source was to be given.

4. In important and practical matters the canonist compiler was to propose a clear and definite solution where canonists differed as to the interpretation of an existing law. The solution proposed must be one of two or more opinions already held in the schools of canon law.

5. If the canonist compiler thought that a change should be made in the law, or something quite new introduced, he was to draw up a canon giving effect to his view, but should also clearly point out that what was proposed was a change or something quite new, and should give reasons for his proposal.

6. The Latin language was to be used.

When a collection of canons dealing with the same matter was ready, it was handed to two, or, in more important matters, to three or four canonists belonging to the same group as the compilers of the canons for their criticism in writing. To ensure an independent judgment, these revisers were unknown to each other and were bound to secrecy. The criticisms and the canons criticised were discussed by all the canonists belonging to that particular group. The groups met, the one on Thursday, the other on Sunday, under the presidency of Cardinal Gasparri. The first of such meetings took place in November 1904, only eight months after the publication of the "*Arduum sane.*" Each member of the group gave his opinion. On the basis of the previous written criticism and of the opinions expressed in committee the president at once drew up a new draft of the canons. This was immediately printed and sent to the members of the committee or group, so that they should be ready with their criticisms of it at the next weekly meeting. This was done until complete agreement, if that was possible, was reached. If such agreement seemed impossible, the canon was drawn up in accordance with the mind of the majority or in harmony with the existing law. This and the opinion of the minority were laid before the members of both groups for their written opinions. These with the president's comments were then submitted twice, if necessary, to the Committee of Cardinals, who then gave a decisive vote.

As the Code became complete, Pius X ordered that copies of it should be sent to all the bishops and to those prelates of the religious orders who are summoned to a general council, that they might suggest changes and additions. In this way the first and second books of the Code, then the third and fourth books, and finally the fifth book were submitted to their criticism. The proposals that resulted were gathered together by Cardinal Gasparri, criticised by him and then submitted to the Committee of Cardinals for their judgment. This was the stage reached when the European War broke out. The work was practically finished in ten years. The Code of Canon Law was promulgated by Benedict XV on May 27, 1917, through his constitution *Providentissima Mater Ecclesia*, which declared that the laws in the Code were to have binding force from Whit Sunday, May 9, of the following year.

Arrangement of the Code.—Something ought now to be said about the arrangement of the Code. The canons, 2,414 in all,

are numbered consecutively from the beginning to the end of the book. The division is not into the old five books of the *Corpus Juris Canonici* but into one based on that found in the Institutes of Justinian, viz. *De Personis, De Rebus, De Iudiciis, De Criminibus atque Pœnis.* This division was first used in the canon law by the layman J. P. Lancelotti in his *Institutiones Juris Canonici* of 1563.[1]

The first arrangement provisionally proposed for the Code of Canon Law was that of a general preliminary section containing "titles" headed *De Summa Trinitate et de Fide Catholica, De Constitutionibus, De Consuetudine* and *De Rescriptis* followed by five books entitled *De Personis, De Sacramentis, De Rebus et Locis Sacris, De Delictis et Pœnis, De Iudiciis.* Finally, the following division into five books was fixed upon, viz., that into (1) *Normæ Generales* (86 canons), (2) *De Personis* (639 canons), (3) *De Rebus* (826 canons), (4) *De Processibus* (643 canons), and (5) *De Delictis et Pœnis* (200 canons).

The *Normæ Generales* open with six canons which are of great importance for the understanding of the Code. It is pointed out that as the Code is made for the Latin Church the Eastern Churches (principally, that is, those in communion with the Holy See) are not affected by it, unless it deals with something which is more than an enactment of purely ecclesiastical law (Can. 1). This canon applies a principle laid down by Benedict XIV in 1742 that, generally speaking, Roman disciplinary laws did not bind the Oriental Uniates unless they were explicitly or necessarily included. Warning (Can. 2) is then given that as the Code has little reference to liturgical laws these bind as before except where they have been clearly altered by the Code. There are about five instances of this. It is also definitely stated that concordats entered into with civil governments are not affected by the canons of the Code. Hence canons which are in disagreement with a concordat have no force in the place where the concordat holds (Can. 3). Further rights already acquired by some concrete act, and privileges and indults granted by the Holy See, which are still in use and have not been revoked, hold good, even when they are not in harmony with the new law, unless they have been withdrawn explicitly by the Code (Can. 4). Canon 5 states a special rule touching the force of existing customs which are contrary to the law contained in the Code. Any custom which is contrary to a provision of the Code, or is forbidden and

[1] *Cf.* Schulte, *Geschichte*, iii, pp. 451 ff., or Wernz, i, p. 67, 430.

explicitly rejected by it, is to be done away with as an abuse and not allowed to revive. Other contrary customs which are not explicitly rejected may be tolerated by the local ordinary (*i.e.* generally the diocesan bishop) if, taking all circumstances into account, he does not think it prudent to abolish them, provided they go back one hundred years or to a time out of mind. All other customs contrary to the Code are *ipso facto* suppressed.

Canon 6 gives six important rules for the interpretation of the new law : (1) All laws, whether they bind the whole Church or only *e.g.* a province, a diocese, a religious order, etc., which are in disagreement with what is laid down in the Code are *ipso facto* done away with, unless an exception is explicitly made for a law not universally binding, *e.g.* the rules of a religious order. (2) Canons which simply repeat the old law are to be interpreted in the old way. (3) Where a canon partly agrees with the law formerly in force, and partly disagrees with it, the former part is to be interpreted as before, the new part in accordance with its plain meaning. (4) If there is a doubt as to whether a canon differs from the law previously in force the law previously in force is to be followed. (5) All penalties formerly existing which are not mentioned in the Code are abolished. (6) Any general disciplinary law, which has been hitherto in force but is not contained either explicitly or implicitly in the Code, loses all force, unless it be found in the official liturgical books, or deals with a matter commanded also by the natural law or the positive law of God.

The rest of the *Normæ Generales* lay down general principles touching Church law, custom, the reckoning of time, rescripts, privileges and dispensations. For instance, laws are declared to be promulgated by publication in the official *Acta Apostolicæ Sedis* and normally come into force three months after promulgation (Can. 9). A custom against a law can only obtain force when it is not an abuse and has been in vogue for forty years without contradiction by the proper authority ; if, however, there is question of a custom against a law, which forbids a contrary custom arising, the custom must be a hundred years old before it can obtain force or at least go back to a time out of mind : a custom which is explicitly reprobated by a law is an abuse and can never obtain force (Can. 27).

The second book *De Personis* is divided into three parts, viz., *De Clericis, De Religiosis* and *De Laicis*. The part *De Clericis* contains two sections, *De Clericis in generis* and *De Clericis in specie*.

The former deals with the rights, privileges and obligations of the clergy, their admission to and loss of office, jurisdiction ordinary and delegated. The latter treats of the Pope, general councils, the cardinals, the Roman Curia, papal legates, patriarchs, primates and metropolitans, plenary and provincial councils, vicars and prefects apostolic (*i.e.* those who have charge in missionary countries which are under the jurisdiction of the Congregation *de Propaganda Fide*), apostolic administrators, lesser prelates, bishops, diocesan synods, the diocesan curia, cathedral and collegiate chapters, vicars *foranei* (or rural deans), parish priests and their substitutes or helpers. The part *De Religiosis* gives a full statement of the law affecting those belonging to religious orders or congregations. The third part, *De Laicis*, deals with the law relating to confraternities and other associations of lay people for religious purposes.

In the third book, *De Rebus*, is grouped together the Church's legislation on the seven sacraments, churches and chapels, burial with the rites of the Church, feast-days, fasting and abstinence from flesh meat, divine worship, vows and oaths, catechetical instruction and preaching, seminaries, schools and universities, the publication of certain classes of books and writings, benefices and church property.

The title of the fourth book *De Processibus*, practically explains itself. This book contains the rules of procedure and the principles to be followed in the various courts of the Church. Special sections are devoted to marriage cases in which a decree of nullity is asked for, the canonization of saints, and finally to short and expeditious ways of dealing, when necessary, with delinquent parish priests.

The last book, *De Delictis et Pœnis*, opens with a definition of crime, explains the circumstances which aggravate or lessen the guilt of a crime, and then goes on to give general rules for the incurring and applying of the various kinds of penalty which are then enumerated and explained, *e.g.* excommunication, suspension, interdict, etc. The Code closes with a list of the penalties incurred either *ipso facto* or after due sentence by various delinquents. This list takes up 100 canons.

Clearness of the Code.—Those who have to use the Code of Canon Law cannot but admire the conciseness and clearness of its paragraphs. There are not many canons where there is any room for doubt. This explains the very great agreement that exists among

the commentators on the Code. This clearness and conciseness is admittedly a great boon.

When a canon or a paragraph of a canon reproduces something dealt with somehow in the old law, there is a reference in the full edition of the Code to a footnote in which are contained references to all the previous documents bearing on the point, whether the law of the Code be in agreement with the old law or not. The order of the references is: (1) the books of the *Corpus Juris Canonici*, (2) the General Councils of the Church, (3) the papal constitutions on the point not contained in the *Corpus Juris Canonici*, (4) the decrees of the Roman Congregations. These papal constitutions and decrees of the Congregations are dated and arranged in chronological order. For the convenience of students the former have been published in full in three volumes of the *Fontes Juris Canonici;* the latter are in course of publication.

Committee appointed for the Interpretation of the Code.—Four months after the publication of the Code, Pope Benedict XV, by the *Motu Proprio "Cum Juris Canonici"* of September 15, 1917, appointed a permanent committee for the authoritative interpretation of the Code. This was to consist of some of the cardinals of the Curia assisted by expert Roman canonists. This committee was empowered authoritatively to declare the meaning of the law in reply to questions put to it.[1] This committee itself has made it known that it would answer only questions put to it by bishops, etc., and the heads or provincial superiors of religious orders and congregations.[2]

Another function of this committee is to supervise additions to or changes in the Code. A general decree of a Roman Congregation, if not in harmony with the Code, must be submitted beforehand for the express approval of the Pope. That obtained, it is for the committee to draw up a canon or canons which shall express the meaning of the decree and then determine what canon or canons shall be displaced by the new. If the decree deal with some entirely new point, the canons in conformity with it drawn up by the committee are to be inserted in the place chosen by it. The new additional canons are to receive the number of the last preceding canon with the addition of *bis*, *ter*, etc.: *e.g.* 130$^{bis.}$ 130$^{ter.}$ if the new canons should be inserted immediately after canon 130. This will

[1] Cf. *Codex Juris Canonici* (12mo), pp. 1 and following for the text of the *Motu Proprio*.

[2] Cf. *Acta Apostolicæ Sedis X* (1918), p. 77.

ensure that the numbering of the canons will be disturbed as little as possible. Notification of any such changes are to be made in the official bulletin, the *Acta Apostolicæ Sedis*. New editions of the Code will of course incorporate these changes.

Some Changes in the Code.—Many of the requests made by the bishops at the Vatican Council had been satisfied by decrees and regulations long before the Code was put together. Further numerous changes in the law hitherto in force are to be found in the Code. A few of the changes give a definite settlement of points disputed formerly among canonists, *e.g.* that the Church *ipso facto* gives jurisdiction, whether it be in her courts or for matters of conscience alone (*in foro externo et interno*), where there has been a general mistake as to the existence of the jurisdiction (*error communis*), even when there has been no seemingly valid, but really invalid, title to jurisdiction (*titulus coloratus*); likewise in all cases where there is a real positive doubt as to its existence, *i.e.* in cases where good reasons for the existence of the jurisdiction can be brought forward as well as good reasons against, whether the doubt be one of fact, *dubium facti* (*e.g.* whether the time for which the jurisdiction was given has come to an end) or of law, *dubium iuris* (*e.g.* when some good authors, in their interpretation of a law, maintain that jurisdiction exists, while others deny its existence) (Can. 209).

There are interesting changes in the law of domicile and quasi-domicile. Before the Code a domicile or quasi-domicile could only be possessed in the parish or its equivalent, now it can be had in a diocese or its equivalent. They may be acquired in the old way, the domicile by coming to a place with the intention of making it one's home, the quasi-domicile by coming to a place with the intention of staying there for the greater part of a year. Now they may also be acquired, the domicile by ten years' residence in a place, the quasi-domicile by residence in a place for more than six months (Can. 92). In this rule we have a general application of a rule which before was applicable only in a few places. Domicile and quasi-domicile are important, because a Catholic's bishop or parish priest is the bishop or parish priest of his domicile or quasi-domicile (Can. 94).

Another change of interest is the statement that what the civil law lays down with regard to contracts is to be followed in the Church courts, unless the civil law in this matter is in opposition to the law of God or special provision is made to the contrary (Can. 1529).

Administration of Church Property.—The administration of Church property has been gone into with great minuteness. It is the local ordinary's duty (*i.e.* generally that of the bishop) to supervise the administration of all church property which has not been by general law or special provision of the Holy See withdrawn from his cognizance (Can. 1519). He is responsible for seeing that the wishes of the donor are carried out when gifts are made or legacies left for religious or charitable purposes (Can. 1515). In all cases the administration of the dowries of nuns is subject to his supervision. They must remain invested in safe securities approved of by the local ordinary and not realized until the death of the nun to whom the dowry originally belonged (Cann. 549, 550). Following a provision of the Second Provincial Council of Westminster held in 1855 and "canonized" in 1881 by the *Romanos Pontifices* of Leo XIII, it is declared that any gift made to a parish priest is to be considered a gift made to the parish unless it is absolutely clear that it is a personal gift to the priest (Can. 1536). The parish priest is the administrator of the parish property (*fabrica ecclesiæ*), as well as of his benefice, unless there is a special provision or custom to the contrary (Cann. 1182, 1476). The system of churchwardens or *conseils de fabrique* is found in very few places now. All surplus money must be invested in safe securities, but the investment must be approved of by the local ordinary (Can. 1523). The same rule holds good for a change of investment (Can. 1539). No extraordinary expense may be incurred without the permission of the local ordinary; otherwise the parish priest is personally responsible for any loss or damage (Can. 1527). To give away, sell, mortgage, loan or lease Church property, the permission of the ordinary is always required for the act to be valid. If the value of the property in question is more than £1,200, the leave of the Holy See is also required. If its value is between £40 and £1,200 the local ordinary may not give permission unless he has the agreement of the majority of his chapter and of the small financial council he is bound to set up. The latter should, if possible, contain experts in the civil law (Can. 1520). The same rules hold for any contract by which the parish may be adversely affected (Cann. 1530–3). A great break is made with the past in that the recognition of lay patrons of new benefices is henceforth forbidden. Those who are already in existence are to be urged, but not obliged, to commute their rights of presentation (Cann. 1450–1).

Marriage Law.—There are also a certain number of changes in

the marriage law which may be mentioned in detail. No change has been made in those hindrances to marriage (impediments of marriage) which make the contracting of a marriage wrong but not invalid. In the diriment impediments, *i.e.* those that make a marriage null and void, there have been a few changes. The age at which a marriage may be validly contracted is now sixteen years and beyond for a male, and fourteen and beyond for a female, instead of fourteen and twelve respectively (Can. 1067). Marriage is now forbidden under pain of nullity to all blood-relations in the direct line, as before the Code, and to those related in the collateral line up to the 3rd degree, *e.g.* second cousins may not marry (Can. 1076). The pre-Code law prolonged the disability up to the fourth degree, *e.g.* third cousins could not validly marry.[1]

The method used by the canon law, the so-called Germanic method, was definitely imposed by Alexander II (1061–73), who thus sanctioned what was already a common practice.[2]

The definition of affinity has been changed by the Code. Formerly affinity arose from carnal intercourse, whether in marriage or out of it: now it arises, according to canon law, only from a valid marriage between baptized persons, whether the marriage has been consummated or not (Can. 97). Like blood-relationship, it affects all in the direct line as before, but in the collateral line it is a bar to marriage only up to the second degree instead of up to the fourth degree, which was the old limit. For instance, a man may not marry the sister, niece or first cousin of his deceased wife, as these, being in the second degree of blood-relationship to his wife, are in the second degree of affinity to him. But the brother of a married man may marry the sister of his brother's wife because *affinitas non parit affinitatem.*

In the pre-code days the diriment impediment of *publica honestas* arose from betrothal and from a marriage that was not consummated.

[1] It will be seen that the canon-law way of reckoning blood-relationship in the collateral line is different from that of the Roman law, which is followed by the civil law. While the Roman law to get the degree of relationship counted all the generations with the exception of the common ancestor, the canon-law method is to count the generations on one side only of the lines of descent. If the two lines of descent are unequal, the generations in the longer line are counted (Can. 96). Hence brother and sister are in the first degree of blood-relationship according to the canon law, but in the second degree according to the Roman and civil laws; second cousins are in the third degree according to the former, but in the sixth degree according to the latter, while uncle and niece are in the second degree (touching the first) or third degree respectively.

[2] *Cf.* Wernz, iv, pp. 616–25, Joseph Freisen, *Geschichte des Katholischen Eherechts*, pp. 406 ff., or shortly the *Catholic Encyclopædia*, s.v. *Consanguinity*.

Since 1907 the betrothal had to be entered upon with certain formalities for it to induce this marriage impediment. According to the Code, the impediment of *publica honestas* arises only from an invalid marriage or from public or notorious concubinage. Its special effect is to bar marriage between the man and those in the direct line of blood-relationship with the woman and vice versa ; *e.g.* a man who had lived in public concubinage with a woman may not marry her mother or daughter (Can. 1078).

The impediment of spiritual relationship arises now only between a baptized person on the one hand and the baptizer and god-parents on the other (Can. 1079). Formerly the parents of the baptized person were debarred from marriage with the baptizer or god-parent. The impediment likewise arose from the sacrament of Confirmation (Can. 1079).

The old impediment of *cognatio legalis* arising from adoption, which was taken over from the Roman law, has been simplified and freed from obscurity by laying down that where the civil law will not recognize a marriage between adoptive parent and adopted child, the Church will not recognize it either (Can. 1080).

The rules touching matrimonial consent remain as before, except that stress is now laid on the statement that ignorance of what the marriage contract means vitiates the consent (Can. 1082). With this and one other exception, the rules are based on the nature of a contract. The other exception has to do with excessive pressure unjustly used to induce consent. According to the canon law, excessive pressure of this kind (*metus gravis*), which does not go as far as irresistible force (*vis*), makes a contract only voidable as a rule (Can. 103). As, however, a contract of marriage between baptized persons after the marriage has been consummated cannot be made or declared void, the Church declares a marriage entered upon because of unjust excessive pressure null and void from the beginning (Can. 1087). Nearly half of the nullity cases tried before the Roman Rota are due to this cause. In other words the Church, because of her doctrine about marriage, had to choose between the alternative of recognizing such marriages as irrevocably valid, or null and void from the beginning. She chose the latter course as the more seemly and more fair to the injured party, leaving it to that party to make the marriage right by giving a fully free consent (Can. 1133).

A new rule is found in the Code on the publication of banns. They may be published as before in church or the local ordinary

may substitute for this the placarding on the church door of the names of the parties wishing to be married (Can. 1025).

The result of the changes in the marriage law is to reduce the number of diriment impediments of marriage. The number of those which do not necessarily arise from the nature of the contract is greater than that found in English law. On the other hand, it must be remembered that the canon law is not as rigid as the civil law. The latter seems to grant no exceptions; the former grants exceptions for a proportionately serious reason in cases where such exceptions are not barred by the natural or positive law of God. Over such the Church has no power. In other words, the Church thinks that certain marriages are very undesirable, and, by making her law, effectively prevents them being even attempted in a great number of cases. In hard cases, when there is a really good reason, a dispensation from the law will be given beforehand; or if the parties have attempted marriage, the bar to valid marriage will be removed.

Where there is a doubt among canonists as to the existence of a diriment impediment (*dubium iuris*), there is no bar to marriage; where there is a doubt, not as to the existence of the law, but as to the existence of a circumstance supposed by the law (*dubium facti*) the local ordinary may dispense (Can. 15), unless the doubt touch the existence of blood-relationship in the first degree (*e.g.* between father and daughter, brother and sister) (Can. 1076, s. 3). Further, local ordinaries, apart from wide special powers granted them by the Holy See, have new and extensive powers under the Code for urgent cases especially in the matter of setting right invalid marriages (Can. 81, 1043, 1045). This power is shared with certain limitations by the parish priest and by the confessor (Cann. 1044–5). Then, stringent regulations are laid down for the parish priest before whom a marriage is to take place. He is bound to make the most careful inquiries as to the existence of an impediment before he publishes the banns (Can. 1020), and to demand a certificate of baptism if either or both the parties were baptized in another parish (Can. 1021). This in time will be good evidence of previous marriage, if either of the parties is a Catholic, as the parish priest in whose church a marriage takes place is bound, if the parties were baptized elsewhere, to send word of the marriage to the priest of the church where the baptism took place. He in his turn is bound to enter the fact of the marriage in the baptismal register (Can. 1103, § 2).

This elasticity in making exceptions and stringency in making inquiry differs greatly from the hard-and-fast procedure of the civil law with regard to marriage. Indulgence may be given to those who think that the canon law is in this more reasonable and humane.

Legitimacy of Children.—No change has been made by the Code with regard to the legitimacy of children, but in view of recent legislation the canon law on the point may be set down here.

The children of a " putative " marriage are reckoned as legitimate (Can. 1114). A putative marriage is an invalid marriage which was entered upon in good faith by at least one of the parties, *i.e.* in ignorance of the existence of a diriment impediment.

Subsequent marriage brings with it the legitimation of the children if the parents were free to make a valid marriage at the time of the conception of the children, during the pregnancy of the mother, or at the time of birth (Can. 1116). In other cases the effect of a dispensation setting a marriage right is to make the children legitimate, if the dispensation was given in virtue of a general faculty possessed by the grantor of it, unless the offspring be the result of an adulterous or sacrilegious union (Can. 1051). The latter is a union where the man is in sacred orders or under a solemn vow of chastity or the woman under the latter. A case would be that of a deacon who became the father of a child and then obtained a dispensation from the impediment of sacred orders and so was enabled to contract a valid marriage.

Nullity Cases.—A final word may be said on nullity cases. These are cases (1) where the marriage has been invalid from the beginning, in other words, where there has been no marriage at all, (2) where the parties or either of them refuse to have the marriage set right by dispensation, if such is required, and by renewal of consent, (3) and either or both ask for a declaration of nullity, so that there may be no doubt that they have been all along free from the marriage bond. Where it is perfectly clear and can be proved from a certainly genuine official document, to which no exception can be taken, that one of certain specified diriment impediments existed between the parties at the time that they attempted marriage, and also equally certain that a dispensation was not given taking away this impediment, the local ordinary, after citing the parties and the official who is called the defender of the (marriage) bond (*defensor vinculi*), may declare the marriage to have been from the beginning null and void. If the defender of the bond thinks that

there exists even the slightest doubt as to either of the above-mentioned points, he is bound to appeal to the court of second instance, *e.g.* the court of the metropolitan (Cann. 1990–1). The judge of the court of second instance must then go into the matter informally with the defender of the bond. It is for him either to confirm the local ordinary's declaration, or to declare that the case must be tried according to the ordinary procedure (Can. 1992). Other not so evident cases, in which the validity of a marriage is impugned, must be tried before a diocesan court consisting of three judges, unless the parties wish to carry the case straight to the Roman Rota and get permission to do so. If the sentence of the court of first instance is against the validity of the marriage, the defender of the marriage bond is bound to appeal against the sentence, because freedom to marry in such a case is given only after a sentence of nullity has been given by two courts. The appeal lies to the court of the metropolitan, unless the defender of the marriage bond prefers to appeal to the Rota. If the court of second instance also gives a sentence of nullity, it is left to the conscience of the defender of the bond to appeal further or not. If he sees any reason for appealing against the sentence, he is bound to do so. In this case the matter must go before the Rota. If he sees no reason for appealing against the sentence, he may acquiesce (Cann. 1576, 1960–9, 1984–9). If the court of first or second instance is the Rota, the appeal is heard by a fresh set of three judges belonging to that body (Can. 1599, § 2).[1] From 1909 to 1926 inclusive 460 sentences in nullity cases were given by the Rota, in some instances more than one in the same case. Finally 218 marriages were definitely declared null and void from the beginning.[2]

The very poor, who are certified as not being able to pay anything, are free from all expense. An advocate is given to them, who is bound to plead their cause gratuitously. Those who can pay some part of the fees and expenses, but not all, are obliged to pay what the judge thinks in the circumstances to be fair (Cann. 1914–16). The fees of the advocates and for examining and copying documents, etc., were fixed for the Rota by Pope Pius X in 1908 when he

[1] The Rota publishes the cases tried by it in the *S. Romanæ Rotæ Decisiones seu Sententiæ Romæ, Typis Polyglottis Vaticani* (Rome Vatican Press). Eleven volumes of about 200 pages each have been published. The last volume, that issued in 1926, publishes the decisions given in 1919. The present price is 20 lire a volume post free from the Vatican Press, or, to give it its full name, the Tipographia Poliglotta Vaticana. Some decisions of the Rota, but fewer than formerly, are published in the *Acta Apostolicæ Sedis*.

[2] Cf. *Periodica de re morali, canonica*, xvi (1927) 70–8.

brought the Rota to life again.[1] They are very moderate.[2] The fees in the bishop's courts should be fixed by the provincial council or by the bishops at one of their yearly meetings (Can. 1909).

The codification of the canon law in the simple and clear form that is found in the *Codex Juris Canonici* has naturally led to a revived and keen interest in the canon law. The knowledge of this has been made comparatively easy; and laws that are well known are likely to be carefully observed, at least by men of good will.

[1] Cf. *Acta Apostolicæ Sedis*, i (1909), pp. 33–4.

[2] From October 1926 to August 1927 forty-five marriage cases came before the Rota. Of these marriages twenty-eight were declared to have been null and void. About half the cases were those of poor people for whom the Holy See paid the necessary expenses. These practically used up what was over from the fees of those able to pay. *Cf.* the address of the Dean of the Rota to the Pope at the beginning of this legal year, *Acta Apostolicæ Sedis*, xix (1927), pp. 354–6.

THE *PARTIE CIVILE* IN THE CRIMINAL LAW OF FRANCE.[1]

[*Contributed by* Dr. P. O. Lapie, *Avocat à la Cour de Paris.*]

Any act whatsoever by one person to the detriment of another shall be made good by the individual through whose fault the loss has arisen.

Thus does Art. 1382 of the French Code Civil enunciate the principle of civil liability.

On these few lines has been built up a whole century of case-law, as extensive in its practical application as the literature devoted to its consideration is bulky.

Through judicial interpretation the rule of Art. 1382 has been adapted to the triple domain of civil law, *droit administratif* and criminal law. Yet first and foremost its function is in the civil sphere; it is concerned with the relations of private individuals *inter se*; it has come into being through the decisions of the Civil Courts.

This Article, however, has been used as a starting-point for introducing the principle into the *droit administratif*, where it has to do with the relations between official persons—the State, the *Départements*, the *communes* and the public services—and those private persons who most frequently come under the jurisdiction of the administrative Courts (*tribunaux administratifs*) and in especial the *Conseil d'État*, a body somewhat analogous to the Judicial Committee of the British Privy Council.

The field of action of this principle even extends to the decisions of the Criminal Courts, and it may be said that it regards them from a threefold aspect.

Criminal Liability.—Criminal jurisdiction takes its first inspiration from the rule of Art. 1382 when it pronounces upon the criminal liability of the accused. Indeed, alongside the purely reformative and deterrent aims of criminal punishment there persists an idea of reparation for the wrong done: this reparation is entirely a moral one and is given by the punishment of the guilty party by putting

[1] Translated by A. W. Blair, Esq., LL.B.

into application the very ancient idea that the suffering of the wrongdoer brought a certain amount of satisfaction to the victim or at least to the latter's memory.

This part of the decision which is of a purely punitive character has such serious consequences on the fortune, the liberty, or it may be the *life* of the guilty party, that theoretically it can only be prosecuted at the instance of the public as a whole by means of a public action vested in a Government Department responsible to the public, viz., the French Ministry of Justice.

In the second place, the criminal law applies the rule defined in Art. 1382 when it orders full reparation to be made—the *remise en état*,[1] by which the culprit is obliged to restore matters to the condition in which they were prior to his criminal act.

This part of the judgment has a double significance—the civil and criminal aspects are both present. In the sense that full restitution is necessary for the maintenance of the peace—for maintaining public order—it is criminal in its operation, and consequently the Director of Public Prosecutions can commence proceedings by indictment and the criminal law is competent to order it without the injured party taking any action. It is civil in the sense that it gives satisfaction not only to the idea of public order, but also to a private interest ; that if restitution is physically impossible (*e.g.* where a stolen object cannot be given back to the owner because the thief has sold it), the loss will be calculated in money ; that the party who has suffered the loss can—and in practice this is always done—demand it on the first count of his punitive action.

Thirdly, criminal jurisdiction applies the rule of Art. 1382 in all its purity, and in the full acceptance of its meaning as known to the civil law, when it lays down the formalities necessary for constituting the action of *partie civile*. It acts as if in a civil case it judges a civil process, and its decision contains no element of a penal or public nature—it is not mingled with the purely criminal aspect of the case ; it simply allows damages to the person who has suffered prejudice as the result of an act which it defines as criminal.

An observation of these three aspects, as applied in the law of crime, brings forth the development of the ideas of civil reparation and liability,[2] at first founded on the chiefly criminal character of

[1] *Cf.* the civil remedy in Scots law of *restitutio in integrum*.

[2] *Vide* Articles 51 *Code Pénal*, 366 *Code d'Instruction Criminelle*, and 198 *Code Civil*.

the decision, then becoming mixed in appearance and finally conforming exactly to the principle of Art. 1382 in the *Code Civil*.

It seemed to the present writer that the working of this civil action in a Criminal Court might be a subject of possible interest to the British legal world.

In English law it is difficult to find any comparison with the French institution other than the special power given to the Court by the Forfeiture Act of 1870. Here the accused can be ordered to pay a sum of money as reparation for the loss caused by his act; but this provision has a rather narrow field of application since it is restricted to the case of felonies and does not apply to misdemeanours, and the sum in question cannot exceed one hundred pounds. Finally, the rule only applies where damage has been caused to property.

Moreover, the English enactment, in its limited sphere, corresponds rather to what we would term *restitution* or *remise en état*, the effects of which we have just observed when proceedings are taken by raising the action of *partie civile*.

Nevertheless it serves as a point of contact to make mention of this slight similarity.

Criminal and Civil Action Joined in Common Process.—Every act may involve two kinds of consequences: (1) It may acquire a criminal character by entering into one of the three categories laid down by French law, viz. *crimes*, *délits* and *contraventions*. It then becomes an offence against the public weal—an attack on public order.

The public as a whole suffers from this attack; it prosecutes for punishment and reparation of the act through its representative the public minister. This official,[1] as ordained by the law, brings the public action. He appears before the competent Criminal Court (the *Cour d'Assises*, *Tribunal Correctionnel* or *Tribunal de Simple Police*) and demands the application of the appropriate penalty laid down by Statute.

The public minister prosecutes in the name of society at large, in order that adequate punishment may be meted out to the individual committed for trial.

[1] In the case of (*a*) *crimes* and *délits*—*procureurs généraux* (Attorney-General), *avocats généraux* (Solicitor-General), the substitutes of the *parquet*—the Public Prosecutor's office, and *procureurs de la République* and their deputies; (*b*) *contraventions*—police commissaries, assistant *juges de paix*, *maires* and deputies appointed by the *procureur général* (Attorney-General); (*c*) for *délits* touching the customs and excise, woods and forests, waterways, etc., the representatives of the Civil Services concerned.

For example—X has voluntarily caused the death of Y. This act is murder ; it is a case for the Assize Court, where the *procureur général* will appear and demand the infliction of the capital penalty.

This same act can also lead to consequences in the civil sphere : it has not only infringed the public law for the protection of society, it has caused loss to a private individual.

If the act in question had no criminal significance, then the party who had suffered the loss could only take proceedings by raising a civil action, by appearing in a Civil Court and asking for allocation of damages. As the act is a criminal offence, the injured party has the right of bringing his *civil* action, which retains its civil character, before a criminal tribunal which will give judgment upon the two actions—civil and criminal.[1]

Let us take the following examples : A father brings the action of *partie civile* against his child's murderer. The Assize Court will condemn in (1) punishment, *e.g.* death, and (2) payment of damages.

In the *délit* of obtaining goods, etc., by false pretences, where an article on hire has been fraudulently sold the lender will appear as *partie civile* against the swindler before the *Tribunal Correctionnel*, which will give judgment upon the three following points : (1) punishment—which can be imprisonment and fine, (2) restitution and (3) damages if necessary.

Take as an example of a *contravention* the non-observance of the law concerning the Eight Hours Day.

A trade union takes action of *partie civile* against an employer who has made his workmen work longer than the statutory day. The Police Court can condemn to, first, a fine as punishment, and secondly to monetary damages, and sometimes it may order publication of the facts in the newspapers.

Thus instead of allowing the public or criminal action to follow its normal course before the Criminal Courts on the one hand, and the civil proceedings to take a separate course before the Civil Courts on the other, French law permits these two actions to be joined in a common process and submitted to the jurisdiction of a criminal tribunal.

The law gives this choice to litigants ; they are not obliged to accept it. The party who has been wronged may bring his action

[1] This is a general instance ; other consequences may flow from the decision, *e.g.* the opening of a civil action before the Civil Courts, as when the *partie civile*, following on a suit where adultery has been proved, starts a divorce case.

before the Civil Courts. Only Art. 3 of the *Code d'Instruction Criminelle*, following the maxim, "The criminal action keeps alive the civil," lays down that "the right of action is suspended so long as no final judgment has been given upon the criminal case begun before or during the course of the civil action."

Moreover, once the injured party has brought his civil action, he must stand by the choice he has made—*una electa via non datur ad alteram recursus.*

Case-law, based upon Art. 171 of the Code of Civil Procedure and Art. 1351 of the Code Civil, has ruled in some very old decisions (Cass. March 18, Year 12 (of the republic) May 9, 1828, and February 11, 1832) that the injured party can no longer bring his action before the criminal jurisdiction once the Civil Court is cognizant of it.[1]

The existence of these provisions tends to make the separation of the actions extremely rare in practice. The plaintiff has every interest in seeing both the criminal and the civil cause judged at the same time.

One may ask whether such a system does not lead to a certain amount of blending between the two actions?

No doubt the State Prosecutor has complete independence of action; yet he can take no action in the civil sphere. The Court cannot officially pronounce upon the civil results other than the question of restitution. Indeed it is from the other side that the tendency to combine the actions comes. For the legal conception of what the *rôle* of the *partie civile* should be, as evolved by the practice of the Courts, is not one whose sole object is the obtaining of damages. Not content with facilitating the criminal action and the Public Prosecutor's task, it tends to work towards the same ends. By an examination of the Statute Law on the subject we shall see how the *rôle* of *partie civile* comes to encroach upon the duty of the public minister.

Persons to whom Right of Civil Action Belongs.—In the *Code d'Instruction Criminelle*, Arts. 1, 2, 3, 22, 30, 31, 63 to 67 inclusive, 145, 159, 165, 167, 182, 191, 212, 217, 273, 358, 359, 366 and 373 are devoted to the civil action. Case-law has added to this chiefly as regards the classification of the persons to whom the right of

[1] The converse is not true; he can, before judgment has been given, and except where he is obliged to postpone if the Public Prosecutor insists on maintaining the criminal action, withdraw his own action from the criminal sphere and bring it in the civil. This is an interpretation of the maxim *una via* favourable to the accused, who is at the same time defendant.

civil action belongs, of those against whom such action may be brought and of the interests involved.

The general rule is that the civil action belongs to every person who has suffered loss as a result of a criminal act. They may be physical or fictitious *personæ*, individuals or groups of individuals.

Those who can act as *parties civiles* are the victim himself, if the criminal act did not cause his instant death, in which case the civil action does not fall into his succession,[1] and again every person to whom the act has occasioned an actual personal loss.

In the previous instance the heirs of the murdered person would not have their right of action *qua* heirs, but because the victim was their source of support.

As a further example, a doctor who by a breach of professional secrecy has prevented a person from marrying or finding employment is liable both for punishment under Art. 378 of the *Code Pénal* and for payment of damages to the *partie civile*.[2]

An additional condition is required in the case of slander and defamation of the memory of the dead. The heirs, spouses and surviving universal legatees have the right of action on condition that to the question of personal detriment is added the intention of attacking their honour or self-esteem.[3]

In regard to fictitious or corporate persons, the rule is not too well defined. It is very wide in its application to unions for the protection of professional interests. The Law of March 12, 1920, amending Art. 5, s. 2, of the Law of March 21, 1884, makes it possible for the professional union to exercise the right of action as *partie civile* before Courts of every jurisdiction, in the case of matters directly or indirectly detrimental to the collective interest of the professions which the union represents. It is very strict as regards other associations.

In the absence of special provision, such as that of Art. 14, Law of November 9, 1915, concerning the opening of wine-shops where it grants it to those bodies recognized as of public utility (*reconnus d'utilité publique*) which carry on the anti-alcoholic campaign—the law will not allow the action to an association with a purely moral object in view, as for instance a vigilance committee for street morality.[4]

[1] *Vide* Besançon, December 1, 1880, Dalloz, 81.2.65.

[2] *Cass., Reg.* April 9, 1895, Sirey, 1896.1.91. Note Poittevin. Another example will be found by referring to *Cass. Civ.* March 7, 1911, Sirey, 11.1.545. Note Lyon-Caen.

[3] *Vide* Law of July 29, 1881, as amended by that of September 29, 1919.

[4] Crim. October 18, 1913, Sirey, 1920.1.321. Note Hugueney.

On the same footing the law refuses the right of action to an association having no capital funds, on the ground that the action could only result in such a body receiving a sum in monetary damages, which it could not legally possess. This is a pointless objection, since in questions of slander and defamation of character it is the publicity afforded to the plaintiff by the hearing in Court which gives satisfaction.[1]

These examples show that the action of *partie civile* can have a moral as well as a material aim—as when children sue for damages caused by their father's death,[2] parents for the death of their young child,[3] a sporting association for an attack on their gamekeeper while carrying out duties for which he was responsible on oath,[4] —all of whom obtain damages by coming into court as *partie civile*. But to be moral the loss must be no less real. A contingent loss will not suffice to open the action. An individual who has on some occasion received assistance from the victim will not obtain damages because of his benefactor's death.[5]

On the whole the right of raising the action is generous enough in scope, and under the influence of precedent, practical necessity and the example of foreign countries it is tending to become still more so as regards partnerships and associations. Much scope also is permitted concerning the individuals against whom the action can be brought.

To those persons responsible for criminal infringement of the law (principals in both degrees and accessories) we must add those whom the civil law holds liable either under the *Code Civil* Arts. 1382 to 1385 or special statutes (*e.g.* Art. 44, Law of July 28, 1881, concerning newspaper proprietors) or under the *Code Pénal* (Art. 73, liability of innkeepers). Persons under civil incapacity are not exempted. It is not even necessary to call their legal representatives. The *Code Civil* expressly states so in the case of a married woman (Art. 216). Judicial decision is less clear as regards minors and persons interdicted from managing their own affairs.[6] It is laid down that as the breach of law is of a purely personal nature,

[1] Decision for Courts-martial at Assize Court Seine et Oise, July 18, 1898, Sirey, 1900.1.473. Note Roux.

[2] *Nancy*, July 4, 1910, Sirey, 1911.2.206.

[3] *Caen*, February 13, 1911, Sirey, 1911.2.279.

[4] *Douai*, October 21, 1913, Sirey, 1913.2.366.

[5] Crim. February 7, 1913, Dalloz, 1913.1.373.

[6] Crim. February 22, 1896, Sirey, 98.1.377; Paris, December 10, 1910, Sirey, 1911.2.179, Dalloz, 1912.2.185.

even an *incapax* can be sued in the Civil Courts for the consequences of his unlawful acts.

Procedure.—We now know the parties to the cause. Let us see what procedure will be followed in settling the issue between them.

The *partie civile* is obliged to satisfy certain fundamental requisites ; he is also restricted to a set form of procedure.

The fundamental requisites are of two kinds. The first is determined by the competency of the criminal action. It appears that if the latter is incompetent, the civil action cannot be brought. This, however, is only so when the action is no longer competent, *e.g.* when a plea fatal to the prosecution has been sustained or because of the death of the defendant at the time of raising the action of *partie civile.* If, on the other hand, the cause of the public action being extinguished (*e.g.* previous judgment (cf. *autrefois acquit* and *convict,*)—pardon—death of accused) does not supervene until after the raising of the *partie civile,* the Criminal Court will not disallow the civil action.

The second requisite is based on the necessity of a link of cause and effect between the offence and the loss. This ruling ought to be considered absolute and should apply to Courts of all jurisdictions.[1] But it only applies to Correctional and Police Courts ; the Assize Court is not bound by it except in questions of offences committed through the medium of the Press (Art. 58, Law of 1881).

In the absence of any legal enactment to the contrary, the Assize Court has power to condemn an acquitted person in damages, *i.e.* a person declared not guilty by the jury (Art. 358, Code Instr. Crim.).[2] But the accused must also be answerable in tort (Art. 366). The verdict of the jury forces the Court to distinguish between the tort and the crime, and the Court must in no wise contest the jury's decision.[3] One can easily imagine that this distinction is somewhat delicate to maintain in practice.

What is the procedure in the action of *partie civile* ? How does a person bring himself into court as a *partie civile* ? At this point in our examination we can testify to the liberality of the rules which determine the right of action of *partie civile.* We perceive that the injured person is not bound by formalities, that he can commence

[1] Crim. July 29, 1911, Dalloz, 1912.1.280.

[2] This anomaly has an historical explanation : for those who drafted the Code the *Cour d'Assises* was the *Cour d'Appel,* sitting as a Criminal Court.

[3] Crim. February 7, 1888, Dalloz, 88.1.289 ; Crim. December 3, 1910, Sirey, 13.1.55.

the action by verbal or written notice at any time between the criminal indictment and the close of the hearing.[1]

Such is the effect of Arts. 66 and 67 (Code Instr. Crim.), with this reservation, that the action must be brought in the Court of First Instance, and cannot be brought for the first time on appeal.[2]

The rule is still wider. The manner of raising the civil action, which we have just observed, by intervention in the criminal suit, is only one of the ways in which it can be brought—known as originating the case by subsequent act (act following on action by the Public Prosecutor).

Now, French law permits of another procedure ; the action may be raised by initial act (*acte initial*) before the criminal action is brought, before the examining magistrate is cognizant of the affair, before anyone is aware of the act the injured party may bring his suit. He complains of the offence, it is through him and on his initiative that the criminal case is set in motion.

Here we have, in a country where the public minister is so proud of his office and so jealous of its integrity, a peculiarity which demands our attention.

Two possibilities fall to be distinguished.

We must first of all refer to the *Code d'Instruction Criminelle*, Arts. 64 (2), 145, 182. In all matters outside the sphere of magisterial examination (*i.e.* in all *contraventions* and in those *délits* which the public minister has not prosecuted) the injured party can at once take action in the appropriate Court ; he proceeds by means of direct citation ; he sends to the alleged wrongdoer an officer's writ requiring him to appear before the Court—to make good the loss he has caused and to show reason why he should not be condemned in damages.

In the second place we turn to Arts. 30, 31, 63, 64 and 65 of the *Code d'Instruction Criminelle.* In the case of *crimes* and *délits*, where the law proceeds by magisterial examination, the action of *partie civile* is originated by a written complaint addressed to the examining magistrate informing him of the *crime* or *délit* committed and at the same time stating that the complainant demands reparation as *partie civile.*

Thus not only does the private individual collaborate in prosecuting the offence, but it is thanks to him that it is discovered and

[1] *Sur la clôture des débats en Cour d'Assises*, Crim. August 9, 1900, Sirey, 1901.1.59.
[2] Crim. February 12, 1904, Dalloz, 1905.1.81.

that the Public Prosecutor will demand punishment in the name of the State.

This public and criminal aspect, which bit by bit begins to colour the civil remedy, will only gradually develop in the course of our examination.

The first result of entering the process of *partie civile* is to transform the victim into plaintiff. Certain documents must be served upon him ; the Public Prosecutor takes official notice of his appearance ; and assisted by counsel he appears at the magisterial inquiry. Having an interest in the cause, his testimony is suspect and he cannot give evidence on oath unless the accused and the Public Prosecutor make no objection to his so doing.[1] He becomes responsible to the accused for the burden of a punitive action. If he proceeded by initial writ he must consign in the registrar's office a sum considered sufficient to cover his expenses. If he fails, not only does he lose this deposit, but he will have to pay all the costs of the case, the State's and his own, even where he only entered appearance by subsequent act. The *partie civile* will fail, although the accused is declared guilty, if he does not succeed in having damages allocated to him. He must pay the total cost, but will have a right of recovery as against the wrongdoer.[2]

He also fails and must pay costs to the State where the accused is declared not guilty by the jury but where the Court allows damages.[3]

The old ruling [4] still holds since the Decree of October 5, 1920, in pursuance of Art. 644, added by the Law of October 23, 1919, retains the sense and at the same time extends the operation of Art. 368. By these measures the law has tied the civil action still closer to the criminal. It is true that much of this severity is mitigated by the possibility of the civil action being abandoned. This, however, ought to be intimated within twenty-four hours of the action being raised, and yet as in practice notice is given at any time until the close of counsel's speeches, it may happen that the *partie civile* will withdraw in order to evade further costs should the matter take an unfortunate development during the hearing.

Aims of the Partie Civile.—The growing *rapprochement* which we observe is gradually taking place between the civil and criminal actions becomes still more marked when we look into the genuine

[1] Crim. May 30, 1908, Sirey, 1911.1.606 ; Crim. June 7, 1912, Sirey, 18.19.1.220.
[2] Crim. May 30, 1908, Sirey, 1911.1.606.
[3] Crim. 5 mai, 1892, Dalloz, 92.1.551.
[4] Crim. December 12, 1855, Dalloz, 56.1.177.

aims of the *partie civile*. These aims are made peculiarly clear at the hearing, especially at a session of the Assize Court, and other indications make them evident throughout.

Counsel for the *partie civile* does not occupy any definitely fixed place in the Assize Court. Whilst his colleague for the defence is seen to grace a seat on the right in front of the prisoner in the dock, and the prosecution has a high-placed tribune on the left, half-way between these two and at mid-height between them, almost hidden in the semi-circular shadow formed by the bench, the counsel for the *partie civile* is seated on an ordinary chair. But the modesty of his position disappears once he rises to plead. He, who might have been taken for an intruder, will play an important part.

The *partie civile* generally speaks after the prosecution and before the defence. Yet on occasion he may refrain from speaking at this stage and only exercise his right of reply. In this case he delivers himself once and for all, thus allowing the defence to make their first speech between the speech for the prosecution and his own; this avoids the impression of hearing the same thing repeated twice, for the *partie civile* can if he wishes speak as a prosecuting attorney.

Theoretically the *rôle* of counsel for the *partie civile* is to make out a connecting link between the offence and the loss caused—to establish in the mind of the jury an appreciation of those facts most harmful to the accused.

In actual practice it comes down to this, that he does his best to excite the jury's sympathy for the victim, and with this object in view the usual method is to work up a violently incriminating case against the accused.

Does he hope, by obtaining a severe punishment for the author of the crime and by making his act appear extremely serious and the loss sustained most detrimental, to establish a certain proportion between the criminal sentence and the civil damages? This line of reasoning would be too straightforward. The problem is more complicated.

It is the jury which decides by answering the questions regarding the criminal guilt of the accused. It is the Court which, independent of the jury's replies, decides the issue of the civil action.

Then why should he plead so strongly for a conviction, as if he were prosecuting on an indictment? Why should he complain if the speech for the prosecution has been too moderate? Why should he represent the facts of the case in a new light, playing upon the emotion of the human heart, recapitulating the manner

in which the crime was committed and extolling the virtues of the victim ?

The explanation is that he is appealing to the sentiment of ordinary jurymen. Is it because he wishes to snatch a verdict from them on the civil action ? Most certainly not !—for the jury cannot do so even indirectly ; but what he wishes is a criminal conviction.

The *partie civile* is looking for genuine reparation, and the only kind that will satisfy him is the punishment of the guilty. Indeed the law admits this when it is stated in one of the orders of the Criminal Chamber in the Supreme Court (*Chambre Criminelle de la Cour de Cassation*) that " he has not succeeded in his attempt to prove the guilt of the other party," [1] and in consequence decides that he has not achieved his object. The *partie civile* who does not obtain the criminal condemnation of the accused has lost his case.

Matters Falling Within the Competency of the Courts.—Having observed the aims of the *partie civile* in those causes competent to the Assize Court, let us now see what we can discover in matters falling within the competency of the *Tribunal Correctionnel* and the *Tribunal de Simple Police.* Since there is moral detriment, the *partie civile* hopes to obtain moral reparation ; and he will find it in the conviction of accused.

In questions of slander and defamation of character there is the conception of satisfaction to the outraged party (the *partie civile*) through judgment in a public Court bringing the matter to light. It is unnecessary to mention again that one proceeds by suing for damages. But when there is really no issue at stake, as when the judge has not to decide who is in the right and who is in the wrong, if it is simply a question of punishing the wrong-doer, then the action for damages is pursued with the one object of bringing criminal punishment to bear upon a private individual.

The last cries of private vengeance come before the tribunal in a modified form as they have passed through the definite channels laid down by law and been subject to the vagaries of procedure.

We can easily go back to the origins of this idea, passing over the interesting arguments put forward during the revolutionary epoch—the time when the distinction between the private and the public action was best appreciated, and the *ordonnance* of 1670, tit. 3, art. 8, when the *partie civile* still bears the name of accuser and is the principal party to the case, the *ordonnances* of the fifteenth and sixteenth centuries, where the Public Prosecutor has only a

[1] Crim. December 18, 1855, Dalloz, 56.1.177.

watching brief, the procedure of the Ecclesiastical Courts which in the thirteenth century witnessed the creation of a Public Prosecutor and the official prosecution, right to the time of the feudal Courts, when the judge only becomes aware of the case through the accusation brought by the injured party, and still further back to the Frankish idea of monetary compensation—which is the first attempt at modifying the implacable application of the law of *talio*.

Thus this private action, without prejudice to the purely civil ends it has in view, sets the public action in motion, and incurs responsibility for the suit in both the civil and criminal aspects of it, by calling for reparation in the criminal sphere.

The raising of the action of *partie civile* makes a criminal conviction possible as the outcome of a civil action.

This is a serious conclusion calculated to make one doubt the value of this institution. If we add to this—the reproach often made against this French remedy—the injustice resulting from the abuse of summonses taken out for trivial affairs which waste the Court's time or with the sole object of intimidating the other party and gratifying private spite, we are bound to ask ourselves what advantages can be claimed to redress the balance ?

Perhaps we could instance the facilities of proof allowed by the criminal law, *e.g.* the citing of witnesses, and the expedition in procedure, now more essential than ever on account of the tremendous amount of work to be done in the Civil Courts.

Are these practical advantages of sufficient importance to justify us in abandoning without a sigh this conception of two actions running on parallel and adjacent lines—on the one hand the State action, the instrument of society at large, attempting to apportion criminal blame and impose the appropriate penalties ; on the other the civil action, brought by a private individual, leading to a judgment on the question of civil liability and the allocation of damages ?

No doubt we shall more clearly observe, if at the end of our examination we turn back for a moment and look at our point of departure, the gradual development by which criminal and civil liability have become linked and mingled together : the confusion of these two actions—public and private—is in the nature of things just as the confusion of the two reparations—penal and civil—is natural in the mind of man.

THE CONCEPTION OF THE STATE AND THE IDEA OF ETHNIC COHESION.

[*Contributed by* BARON HEYKING, D.C.L., PH.D.]

The Nation versus The State.—There is hardly a subject of more practical and more palpitating political interest than the opposition between the conception of the State and the idea of ethnic cohesion which is now shaking the political foundations of Europe. No less than peace or war is at stake, according as to how this antithesis is or is not solved! Is the tribal or the civic idea to dominate the future of the civilized world? We cannot escape this momentous question.

Origin of Nationalism.—At the very outset it must be acknowledged that in primeval times communal concentration and the State had an ethnic origin, but this was rather due to the archaic conditions of life prevailing at that epoch, just as the Christians of the first century and some students of the Quartier Latin in Paris were practically communists, such economic promiscuousness being the most suitable to that particular form of social relation. The family is the prototype of human life in the broad sense of the word. The family grows and expands to a patriarchal community, a horde, tribe or clan; by and by, nomad existence is changed into permanent occupation of the soil; several tribes join hands and constitute a people, and several peoples become a State, the scope of which reaches wider than the interests of any one particular tribe. Ethnic cohesion—viz. nationalism, of ancient times—is merged into the higher denominator of the State which overrules all social relations.

State in the Ancient World.—Plato pretends that the Doric city republics established by Lycurgus should serve as a model for all people at all times, and he assumed, as did also his disciple Aristotle, that the citizen should sacrifice all that goes to make up individual interest, even his personal freedom, for the sake of the State.

Similarly, the Roman Empire put an end to nationalism by unifying the most diverse racial elements into the conception of

the *urbs orbis*, Rome, the city and centre of the world. The character of *civis romanus*, a Roman citizen, embraced all ethnic appreciation.

State in Middle Ages.—Later on, in the Middle Ages, the feudal system and the structure of the different "States" or classes determined the entire position of the individual in the State without reference to his ethnic origin. State in the person of the Sovereign was the absolute and patriarchal Master. Louis XIV of France could say with much truth, *L'état c'est moi !* The oath of allegiance to William the Conqueror contained no allusion to racial nationality from either Norman or Anglo-Saxon. They detested each other cordially, but public law took no notice of racial differences in determining their political allegiance. The new English nationality was formed by the centralizing power of the King; similarly, in France, the different racial elements, the Bretons, Normans, the Alsatians, the Basques, the Burgundians, the Catalans in the Pyrénées, the peoples in the North, speaking the *langues d'œil*, and those of the South speaking *langues d'oc*, the Gauls, the Latins and the German-Franks, together, all combined under the same political allegiance, and this centralizing influence of the King was throughout the centuries focused in a common civilization radiating from the great cultural centre, Paris. Pretensions of a racial nature and rights peculiar to the individual did not exist.

Influence of the Church.—The same might be said of the Roman Catholic Church, which is opposed to any claim of racial particularism, basing herself on the doctrine of the universal realm of Christ uniting all Christians in one common faith without national bias. Moreover, theocracy, viz. the strange identification of a State of purely temporal aims with a religion of purely spiritual and Adventist vision, became even more firmly rooted since the Emperor Constantine (323–37) made the Christian religion a special concern of the State. Personal rights and pretensions to racial or religious freedom ceased to exist under these circumstances, and the philosophic and juridic theories vied with one another in extolling the absolute power of the State over the individual.

The State-Leviathan.—Men like Hobbes, Bodin, Bentham, Austin, Machiavelli and Hegel surpassed each other in vindicating for the "State-Leviathan" (the expression dates from Hobbes) unchallenged rule in all juridical, religious, linguistic and ethnic matters. This order of things remained unchanged when, in the epoch of the Reformation, the State claimed for itself the right to decide for

the religion of its subjects (*cujus regio, ejus et religio*). Tolerance of personal conviction was ruled out of the question.

Demand for Personal Rights.—However, the *fiat lux* of personal rights finally emerged out of the darkness of the Middle Ages. It dawned upon mankind that the tyrannic conception of the State as a sort of slave-driver is essentially and logically wrong, that, on the contrary, the State represents nothing more or less than the policial organization of society itself, the citizens who are its component and integral parts, who give it the very right of existence and without whom it is unthinkable. It appeared, therefore, that the State should not have any existence outside the will of its citizens, being identical with them and only distinguishable from them in so far as it represents them in their totality; that being so, the "consent" of the citizens themselves should have a say in the ruling of the State. The idea of the collectivism of the State is thus compatible with individualism.

Reconciliation between Rights of Individual and Rights of the State.—The doctrine of Jean-Jacques Rousseau of personal freedom with its corollary of the sovereignty of the people was at the same time the premise to the principle of ethnic nationalities as a form and an extension of the principle of human freedom. Even Vattel (1714–67), in his book of *International Law*, vol. i, c. 3, s. 264, doubted whether a community of men could be considered as the exclusive *patrimonium* of a sovereign, and he concluded that the inhabitants of a province or a town ceded by one State to another had the right to express their will whether they wished to belong to another State. This point of view was even put into practice at the Diet of the people of Burgundy at Dijon on June 4, 1526, when they put forth a formal refusal to be separated from France and also found expression at the Congress of Vienna in 1815, when Lord Castlereagh defended the particularism of the Poles against the attempt to deprive them of their ethnic nationality.

Thus the idea of personal freedom against the illimitable power of the State dates back to the sixteenth and seventeenth centuries. As far back as 1581 the Declaration of the Netherlands postulated the rights of the individual, and the Declaration of Independence of the thirteen North American colonies of Great Britain of July 4, 1776, contained an interpretation of "human rights"; the American Constitution guarantees freedom of speech, of the press and of association, the inviolability of the individual and of the home, the right to be judged by an impartial jury and the right to private

ownership, no distinction being made between the differences of creed and racial origin. The philosopher Locke, in unison with the School of Natural Law, felt the necessity of putting some limits to the power of the English Parliament which had become all-powerful under the Lord Protector Cromwell, and English Public Law adopted this doctrine and gave it a precise expression. Later on, Montesquieu, the author of *l'Esprit des Lois*, an admirer of English municipal law, formulated *les droits de l'homme*, which afterwards was recognized and sanctioned by the French Revolution. Thus, the principle of absolutism and of the sovereignty of the State received a formidable blow which was then followed by another onslaught.

Rise of Nationalist States.—At the beginning of the nineteenth century the old States, founded on dynastic lines, fell under the sledge-hammer blows of the Great Corsican; furthermore, in the wars of liberation, the European nations, throwing off the yoke of Napoleon, became conscious of their power to determine their fate themselves, and the nationalistic movement amongst the masses derived therefrom their first inspiration. Then Napoleon III gave the movement his formal and official sanction, proclaiming as a general principle that each ethnic nationality should have the right to form a State and that each State must form an ethnic nationality. The same theory of ethnic cohesion applied to the principle of the State was adopted later on by the Swiss Professor of International Law, Bluntschli, although his own country, consisting of three or four different national elements, is a manifest contradiction of this idea. But the most pronounced partisans of racial nationalism were found in Italy, where political consolidation took the form of racial unification. After the wars of unification of the Peninsula, under the leadership of the House of Savoy and Garibaldi, Italian doctrine took the advantage of basing the State on the community of racial origin. Giuseppe Mazzini, Mancini, Gioberti, Mamiani—to quote only four of the foremost nationalists—went even so far as to postulate a national right which overlaps the rights of the State and embraces all peoples of the same racial origin, whatever their habitat may be. This creed corresponds to the Pan-German ideal, which found its popular expression in the song of Hofmann von Fallersleben, "What is the German's Fatherland?"

Modern Theory of "Self-determination."—The "rights of nationalities" made further progress during the Great War when on June 20,

1916, at Paris, a conference of delegates of different nationalities carried a resolution to the effect that the right of self-determination belongs to every nationality, great or small, on the same basis as the "rights of man." No annexation or transfer of territory should take place against the will of its population. In the same sense a "Chart for the World," elaborated by Paul Otlet, stated that "a nationality founded on community of origin, of customs and language, occupying a definite territory and maintaining a particular social order, has the right to independence, or at least to local autonomy in consequence of the right of personal freedom." Finally, the famous "fourteen points" of President Wilson gave the last touch to the claims of racial nationalism. It was the climax of a new phase of international law which, however, could not be corroborated by practical statesmanship. The Utopian and anarchistic theory of Rousseau of the absolute freedom of the individual was put to the test by applying it to a community of persons and giving them the right of deciding their own political allegiance, thus resulting in a *reductio ad absurdum*, because the conclusion from the personal rights of the individual to the rights of a community of persons is logically unsound, as the former represents a quite different entity from the latter. Municipal law in civilized States has recognized the right of the individual to retain his nationality or to relinquish it for another allegiance, but in the case of a body of people this right is subject to political, geographical, strategic and economic considerations, which give it quite another signification. This is the reason why even the authority of President Wilson was not able to save the principle of self-determination when it came to its practical test at the Peace Treaty of Versailles.

Race Minorities in New States.—The States created at that Peace Conference all contained a large percentage of racial minorities which, by the very fact of being exceptions to the racial idea of the State to which they were joined, found themselves in an inferior and oppressed position. The protection of the minorities by the League of Nations, which is a League of Governments—viz. of racial majorities—has proved ineffective, inasmuch as the wolf is a bad guardian of the lamb! The principle of liberty for the people has fostered a new sort of tyranny—Cæsarism of the ethnic majority in the new States, so-called national. The intolerance of nationalism at home and its aggressiveness abroad has been the cause of discord between citizens of one and the same State and a

growing menace to international peace, as there is no State in the world which could tolerate another State interfering with its internal order on the score of considerations of a racial nature—a standpoint taken up by Mussolini himself, despite his own aims of Pan-Italianism. Racial nationalism means, under these circumstances, not peace but war, and as a matter of fact the nationalistic ideology put forward by Napoleon III has been the means of bringing about a series of wars up to the time of the Great War. And as the same causes produce the same effects, the world will know no peace as long as nationalism instigates the nations for war.

Community of Race not General Principle of State.—Ethnic cohesion may contribute to the consolidation of a State, but it cannot serve as a general principle for the State. The safeguard of personal freedom lies in the organic connexion of every citizen with the State, irrespective of religious persuasion and racial origin, for the sake of personal safety, justice and the exercise of all the activities appertaining to civilized life. The State, as a prototype of a moderator controlling egocentric and party interests, is the greatest social ideal which humanity has created, whilst ethnic cohesion, not unsound in itself, is a somewhat archaic conception, falling short of this ideal. Regarded from this point of view, the Peace Treaty of Versailles has been a failure. It was a double-edged weapon that was turned against Austria-Hungary, Bulgaria, Turkey and Germany, to appeal to nationalistic instincts when the possibility for satisfying them to a full extent did not actually exist.

Dissatisfied Racial Minorities in Europe.—The presence of numerous dissatisfied racial minorities in racial States is a Mene Tekel—ominous for the peace of Europe. Racial nationalism has become the stumbling-block for international co-operation and goodwill. Even such a chauvinist as Professor Ramsay Muir, Professor of History at Victoria University, Manchester, in his book on *Nationalism and Internationalism*, condemns the " influence of the pestilential racial doctrine." In America it was precisely the enlightened aloofness from racial and religious preoccupation which made for the stupendous progress of the country. The proverbial American " melting-pot " of nations is in the first place not a phenomenon of nationalistic assimilation, but rather a medium of producing a new political entity out of different racial elements. American ideology was primarily political and found its chief expression in the will to be a collective entity, a State in opposition

to the racial nationalism of the European species, where the question at issue is the aggrandizing of one racial element to the detriment of another. Of course national assimilation proceeds in the United States as a matter of course under the guidance of personal choice, and influenced by the ascendancy of Anglo-Saxon culture and civilization. True statesmanship does not lie in the direction of racial assimilation, but rather in a wise co-ordination of the different racial elements for the benefit of citizenship. Racial citizenship embraces all higher aspirations of civilization and stands therefore as a higher conception than race in the evolution and progress of humanity.

Rise and Fall of Nations.—The pretensions of racial superiority are not countenanced by the historic past. Now one nation, now another, is pushed to the front in consequence of most varied circumstances. Thus, the Scandinavians, at a time when courage, initiative, energy and physical strength could play a prominent part, were enabled to found new States. Before them, the tribes of the Nordic race have migrated to the south, establishing their reign on the ruins of the Roman Empire. In ancient times, the Phœnicians, thanks to their maritime enterprise, were able to settle on different points along the Mediterranean. By military valour, the Summerians, the Babylonians, Persians, Egyptians, Romans, Macedonians under Alexander, the Mongols, Turks, Saracens—each in turn subjugated vast tracts of territory in Europe and Asia. The ascendancy of Greece in the heyday of her power was due to actual superiority of civilization. In the Middle Ages, the Germans, the Dutch, the Spaniards, the French, each have had, in sequence, a period of supremacy in Europe. Again, the English, after almost endless wars, arrived at a consolidation of the British Isles and at unheard-of colonial expansion. At the present time the United States have, through their capacity for collectivism and other sterling qualities, their geographical position, their natural riches, their mass production and civic freedom, acquired a paramount international position of power and prosperity. There is therefore, in the destiny of nations, a constant up and down.

Rise and Fall not determined by Racial Origin.—What decides the fate of nations is not racial origin, but the coincidence of certain qualities in a certain people with certain opportunities which present themselves at a given psychological moment. On the other hand, history proves that racial nationalism leads to stagnation. Every savage tribe was prone to think themselves special favourites of

God and to treat others as barbarians and good-for-nothing, an illusion which necessarily produced backwardness and decline. The Chinese pretence to be the " Sons of Heaven," and the Slavophile idea that Russians are " the salt of the earth " in comparison with the so-styled " rotting West," have resulted in fatal setbacks.

Unsatisfied Racial Aspirations.—At Versailles, the formula for a real peace was not found; in Europe, dissatisfaction is almost general. France is opposing the demands for local autonomy from Alsace-Lorraine; Italy denationalizes the Tyrolese; Yugo-Slavia and Czechoslovakia have missed their opportunity of constituting themselves a confederation of cantons and by so doing securing to themselves the loyalty of their citizens. Rumania is disunited by her refusal to grant autonomy to her racial minorities, the Magyars, Russians, Germans, Jews; Russia, groaning under the yoke of Bolshevik tyranny, has been deprived of provinces necessary for her very existence, Bessarabia and her Baltic Provinces and those territories inhabited by White Russians, and the Ukrainians; Poland, deprived of Lithuania, which belonged to her for centuries, has indemnified herself by annexations of German territory essential to Germany; finally, the Balkan peninsula has not yet received a political configuration by which her racial elements might be appeased. The fate of Hungary and of German Austria, helpless economic torsos, unable to live unaided, gives special cause for alarm. Self-determination, in view of the *Anschluss*, is denied to Austria; furthermore, it is considered inexpedient that she should take part in a Danubian Confederation or join Switzerland; Czechoslovakia or Italy is unable to assimilate this large German morsel for fear of upsetting its own national balance. Thus the problem of how to combine racial aspirations with the requirements of statesmanship still hangs in the balance. However, the conception of the State needs not to interfere with the idea of ethnic cohesion, and, *vice-versa*, ethnic cohesion does not necessarily threaten States composed of several ethnic elements any more than religious differences between peoples of one and the same State menace its existence. Peace and prosperity in Europe depend, in a large measure, on international federation combined with religious and ethnic tolerance, and Central Europe should lead the way in that direction by making an alliance between Czechoslovakia, Austria and Germany, which geographically form a natural whole. But the triple alliance needs not to revive the old bankrupt game of alliances and counter-alliances. On the contrary, it should be but

the nucleus and beginning of an alliance comprising all those States of Europe which nowadays labour under the misconception of a nationalistic antagonism. If the foundation for such a political and economic Entente all round be laid, questions of detail, such as regulations of frontiers, economic conventions, ethnic liberty, and the like would result therefrom automatically and the spirit of peace and collaboration for mutual benefit would at last dawn in Europe. The alleged unavoidable antithesis between nationalism and internationalism which, for instance, Professor Ramsay Muir extols in his book devoted to that subject, is only due to an exaggeration out of all sane proportion of those principles most commendable in themselves, such as patriotism and international collaboration.

Federation of Related States.—The idea of an international federation in Europe without compromising the universal aims of the League of Nations—viz. the union of European States closely related in their culture and civilization which are being kept apart merely by narrow-minded exclusivity—is not in opposition to love of the homeland and individual nationality. It is of paramount importance and actuality, in that it eliminates the possibility of another world-war, the consequences of which would be even more fatal for morals, law and civilization than was the case in the last Great War. Nationalism would be well advised to give up the illusion that it has taken out a patent for the national idea ; on the other hand, there is an ever-widening conviction that all civilized States stand in need of collaboration and assistance from each other so as to satisfy all their cultural requirements. If nationalism and internationalism are reduced to sound proportions, if from the one be taken the sting of hatred and from the latter its national indifference, it would appear that a right valuation of nationality is compatible with international mutual appreciation ; even more so—it will be seen that the one is the resultant of the other and that both, as complements, do not counteract each other, but form a harmonious whole.

THE REFERENDUM IN GERMANY.[1]

[*Contributed by* PROFESSOR RICHARD THOMA, *University of Heidelberg.*]

Introduction.—The Constitution of the German Republic is characterized by attempts interesting and in part novel to combine representative institutions with plebiscites. Taken as a whole, both the *Reich* and the 18 States of which it is composed are " indirect " (*mittelbare*) democracies. Parliamentary government prevails, and is secured by the express provision of the Constitution that the government must resign if the parliament expresses its want of confidence (art. 54). All laws, including amendments of the Constitution, are in principle and normally passed by the parliament only. On the other hand, the constituent assemblies considered it necessary to create certain hindrances and restrictions in order to prevent abuse of power by a majority in Parliament at any particular moment. This led to a novel system of " checks and balances " which in the constitution of the *Reichstag* is very carefully worked out. The checks upon the majority in the *Reichstag* are, firstly, the powers of the President of the *Reich*, who is elected by the people; secondly, the powers of the federal *Reichsrat*; thirdly, certain rights given to a parliamentary minority; and, lastly, various possibilities of appealing to a direct decision by the people.[2]

In the States in which the head of the government is not chosen by popular election it is natural that the possibilities of appealing for a plebiscite should be more various and should be, in practice, more important than they are in the *Reich*. In the following pages I propose to explain broadly those institutions of German democracy which consist in the direct legislative initiative and the various ways in which legislation may be affected by a decision or resolution arrived by a direct vote of the German electorate.

It is tempting to examine at the same time the motives which induced the different parties which collaborated in preparing the new Constitution to reconcile themselves to the introduction of institutions which belong more properly to democracies of the " direct " and " radical " type. And it would be interesting to discuss what is the political value of these institutions, what are the dangers attached to them and how the character of the German people is likely to react to them. The

[1] Translated by the Editor.

[2] In the article by the author of *Der Staat* in the 4th ed. of the *Handwörterbuch der Staatswissenschaften*, vol. vii, pp. 724 *seq.* and p. 736, will be found a description of the German Constitution as one falling into the class of " mixed " democracies.

space at my disposal, however, does not permit the discussion of such matters. One remark and one only may be permitted. The German party system with its numerous groups has always inclined to excessive rigidity in its organization and its party programme. The system of proportional representation strictly observed in the Constitution will tend to make the divisions of party even more clear-cut. It is, therefore, the more wholesome that opportunity should be given from time to time to the individual citizen to answer "Yes" or "No," quite regardless of his party affiliations, to some single political question which is at the same time important and intelligible to the plain man.

In what follows I shall endeavour, without going too deeply into the details of the different State laws, to give the reader some idea of the Referendum, using that term in the widest sense, in German constitutional law, and I shall explain the part it has played so far in the government of the young Republic in the years 1919 to 1926.

It will be convenient to deal first with the law of the *Reich* and afterwards with that of the several States.

I. Referendum in the Reich.—In the law of the *Reich* there is no case in which a referendum is compulsory. But the bold step has been taken for the first time in any of the large States of providing in certain cases for an optional referendum, which means in Germany an appeal to an electorate of over 39 millions.

Popular Initiative in calling for Legislation.—This is termed a "Popular Request" (*Volksbegehren*). A "Popular Request" may be presented in all kinds of cases and the procedure is laid down with exemplary precision partly in the Constitution itself (art. 73) and partly in the supplementary law of June 27, 1921, as to "Decisions of the People" (*Volksentscheide*). The main rules are as follows:

(*a*) A "Popular Request" must be in the form of a complete Draft-Bill and not of a mere suggestion.

(*b*) The citizens who wish to exercise the right of Initiative must procure and submit to the government the signatures duly authenticated of 5,000 voters in support of the request.

The necessity of procuring these signatures is dispensed with if the executive of an association satisfies the government that 100,000 of the members of the association support the petition. This first step is called the "Application for Leave" (*Zulassungsverfahren*).

(*c*) The next step is for the government to direct the so-called "Collection of Signatures" (*Eintragungsverfahren*). This is done by notifying all the local authorities to procure within a fixed period from the voters on the registers duly authenticated signatures in support of the popular request.

(*d*) The signatures are then counted. If it is found that one-tenth of the voters on the register have voted in favour of the "Request," it is considered to have been sufficiently supported.

(*e*) The Draft-Bill is not submitted in the first instance to a vote of

the people, but is laid before the *Reichstag*, which takes it under consideration like an ordinary Bill.

(*f*) If the *Reichstag* agrees to the Bill without amendment (by a simple majority if it is an ordinary Bill, or by a two-thirds majority if the Bill involves a change of the Constitution), the Bill is passed and no Referendum is needed. If the *Reichstag* rejects the Bill, the "Popular Request" is then published in order that the people may vote upon it. If the *Reichstag* passes the Bill with amendments, then both the unamended draft and the draft as amended are published together. The voters in such a case can vote "Yes" as to one form of the Bill and "No" to the other, or they can vote "No" as to both forms.

(*g*) A Draft-Bill is agreed to and is promulgated as a law if there is a majority in favour of it of the votes cast unless it is a Bill altering the Constitution or conflicting with a constitutional provision. In this case the Bill requires the support of a majority of all the voters on the registers.

(*h*) Lastly, account must be taken of the provision of art. 73, par. 4. "A 'Decision of the People' can be demanded only by the President of the *Reich* if the question relates to the budget or to any law of taxation or one dealing with official salaries." It follows from this paragraph read in connexion with par. 1 of art. 73 that in regard to matters of this kind no "Popular Request" is admissible. And in truth questions of finance or concerning official salaries are not suitable for "direct" legislation. Up to the present time only one "Popular Request" has been carried through.

Case of Property of Ex-Sovereigns.—This was in regard to the question of the division of the property of the former reigning sovereigns between the States and the royal families. In 1926 there was a deadlock in the *Reichstag* concerning a Bill on this subject. The Socialist party, in order to put pressure upon the majority of the *Reichstag*, combined with the Communists to present a "Popular Request" of a very radical character. The draft as prepared by those who initiated the procedure provided for complete expropriation of the former reigning princes without compensation. The "Collection of Signatures" in the month of March brought in 12,500,000 signatures in support of the Request—that is to say, far more than one-tenth of the electorate. Accordingly, the draft fell to be considered by the *Reichstag*. As was to be expected, the *Reichstag* rejected this radical proposal. This rendered necessary a "Decision of the People." This "Decision of the People," about which political passions were excited to an extraordinary pitch, took place on June 20, 1926. The result was that of 39,785,950 voters on the registers, 15,599,797 gave their votes—14,455,184 voted "Yes" and 585,710 voted "No." The small number of those who voted "No" is easily explained. It was not in the least necessary for the opponents of the measure to go to the polls. In the view of the government and of the majority of the *Reichstag* the Bill was one in-

volving a change of the Constitution. It is true that in one of the few places in which the Constitution betrays a certain concession to socialistic claims it is enacted that there may be an expropriation without compensation by an ordinary law of the *Reich* though not by the law of a State (art. 153, par. 2). But an opinion obtained from the Minister of Justice rightly pointed out that to throw the property of the Ex-Sovereigns into the National Treasury without compensation was not an expropriation of the kind contemplated in art. 153, but was a confiscation not allowed by the Constitution. Accordingly the law was rejected, seeing that less than half of the voters on the register had voted for it.

It is certain that an overwhelming majority of the German people would have voted in favour of this " Popular Request " if it had contained a clause that suitable provision should be made for the princely families in the shape of landed estates, capital sums of money and annuities.

Apart from Bills which propose constitutional changes, a " Decision of the People " is given by a simple majority of the votes recorded in every case of a direct *Initiative*. And this appears to be so, though the point is disputed, when the Referendum is one to decide between a Draft-Bill as presented in the " Popular Request " (*Volksentwurf*) and this Bill with amendments made by the *Reichstag*.

Difficulty of abrogating a Law by Referendum.—As regards the *other* cases of legislative Referendum which will be discussed later, there is a provision in the Constitution of the *Reich* which makes it extremely difficult to bring about a Referendum upon a law which the *Reichstag* has passed. Art. 75 enacts: " A determination of the *Reichstag* can be set aside by a ' Decision of the People ' only when the majority of the voters upon the register ' take part in the voting.' " The effect of this is that in the cases where a law passed by the *Reichstag* is submitted to a Referendum, those who are in favour of the law will simply stay at home in order not to swell the number of those " who take part in the voting." And, further, that the opponents of the measure will have to bring up to the poll more than half the electorate, in order to succeed in voting down the Bill—that is to say, nearly 20,000,000 voters. This provision indicates that the Fathers of the Weimar Constitution, while they had a certain sympathy with the " Popular Initiative," at the same time entertained considerable distrust of a Referendum to reject a law (*Verwerfungsreferendum*). They admitted such a Referendum only as a safety-valve for exceptional cases in which the people by an overwhelming majority were deeply and passionately opposed to a law which had gone through the *Reichstag*.

The Constitution of the *Reich* does not allow the " Initiative calling for a Referendum " (*Referendumsinitiative*)—that is to say, the possibility of submitting a law to a Referendum *before its promulgation*, whether this be demanded by a resolution of the *Reichstag* itself or by a certain proportion of the citizens.

Instead of this system we find, however, a combination which is both original and ingenious of minority-rights in the *Reichstag* and of "Popular Request."

Right of Minority in Reichstag to provoke a Referendum.—According to art. 72, "The promulgation of a law shall be delayed for two months if this is requested by one-third of the *Reichstag*. Notwithstanding such a request, the President may promulgate laws which are declared by the *Reichstag* and the *Reichsrat* to be 'urgent.'"

And by art. 73, par. 21, "A law the promulgation of which has been delayed at the request of one-third of the *Reichstag* shall be submitted for a 'Decision of the People' if this is demanded by one-twentieth of the electorate." The great value of the right thus given to a minority lies in the fact that it protects the minority when there is a dispute as to whether a law involves an infringement of the Constitution. It gives the minority a weapon against possible attempts by the majority to pass a law affecting the Constitution by a simple majority instead of by the two-thirds majority necessary for constitutional amendments. No such attempted violation has so far occurred, and as yet there has been no practical application of this method. The reason for this is perhaps partly that art. 75, as we have already explained, makes it very difficult for the minority to succeed in getting a law revoked by such a "Decision of the People."

Conflict between Reichstag and Reichsrat.—In democracies whose Parliament has two chambers, a Referendum is a natural way of getting out of a deadlock caused by disagreement between the two Houses, and the advisability of providing for such a Referendum was much discussed in England in the years 1910 and 1911. Provision for a Referendum in such a case is made in other federal Constitutions, for example, the Swiss and the Australian.

The German Constitution, however, consists now of a single chamber, though with it is associated a *Reichsrat*, which serves to represent the *governments* of the federal States, and this *Reichsrat* has a certain right of veto. The *Reichsrat* can within two weeks of the passing of a law by the *Reichstag* enter a Protest (*Einspruch*). In that case the law must be submitted to the *Reichstag* to be voted upon a second time. If this leads to no agreement between the *Reichstag* and the *Reichsrat*, the President can within three months order the question to be submitted to a "Decision of the People." Should the President not avail himself of this right, the law falls to the ground. If, however, the *Reichstag* by a majority of two-thirds has rejected the Protest of the *Reichsrat*, it is the duty of the President within three months either to promulgate the law in the form in which it was passed by the *Reichstag* or to direct a "Decision of the People" (art. 74, par. 3).

If the law is one altering the Constitution, the *Reichsrat* itself can demand a "Decision of the People" before the promulgation of the law if its Protest has been disregarded by the *Reichstag* (art. 76, par. 2).

The *Reichsrat* has already made use of its right of Protest upon certain occasions, sometimes with success and sometimes unsuccessfully. So far, however, there has not been an appeal to the " Decision of the People " in such a case.

In the interests of economical administration the concurrence of the *Reichsrat* is required for any new grant or increase of a grant in the parliamentary budget. If the *Reichsrat* refuses its concurrence, the President may in theory direct that there shall be a " Decision of the People " in the manner provided for in art. 74 (art. 85, pars. 4 and 5). But this has never been done in such a case, nor would it be expedient.[1]

No Presidential Veto.—According to the principles of parliamentary government developed first in England and adopted later in most European countries, it is the duty of the head of the State to promulgate a law passed by the Legislature. Following this principle, the German Constitution has declined to give to the President of the *Reich* such a right of veto as is enjoyed by the President of the United States of America.

President's Power to provoke Referendum.—The President of the *Reich*, however, has the right within a month of the passing of a law to appeal against it to a " Decision of the People " (art. 73, par. 1). But his order to this effect requires, like every other governmental act, the counter-signature of the Chancellor or of a Minister, and these officials are, in principle, normally in political agreement with the majority in the *Reichstag*. This sufficiently explains the fact that as yet no such " President's Referendum " has taken place.

President's Power to dissolve Reichstag.—Of much more practical value is another way in which the President may appeal to the people —that is, by dissolving the *Reichstag*. It is true that for this, as being a governmental act, the counter-signature of the Chancellor is necessary, and the dissolutions which have occurred so far have all been by agreement between the President and the government in power. But it is constitutionally admissible in a case of conflict that the President should dismiss the government, appoint a government taken from the opposition in the *Reichstag*, and, at the same time, decree a dissolution of the *Reichstag* and should get all these acts of government counter-signed by the new Ministers. Of course, in such a case everything will depend on whether the government so appointed succeeds in getting a majority in the new *Reichstag*, or whether it will be at once turned out of office as a result of the elections. In this matter, as in many others, the powers of the President of the *Reichstag* are identical with those of the King of England.

Seeing that the President of the *Reich* is elected by the people and that he has this right to dissolve Parliament, it was not necessary to

[1] See the comparative study prepared at my suggestion by Dr. E. Braun, *Die Ausgabeinitiative des Parlaments in ihre Entwickelung und Geltung* (*Archiv des öffentlichen Rechts*, Band VI, 1924, pp. 42–92).

provide in the Constitution for a Referendum on the question whether there should be a dissolution.

In the laws of the several States, as we shall see later, such a Referendum is an important feature of the Constitution. Nor has the *Reichstag* itself the right to decide its own dissolution.

Referendum as to Removal of President.—In the Constitution, however, provision is made for a somewhat singular kind of "Decision of the People" which may lead indirectly to a dissolution of Parliament. In art. 43 of the Constitution it is enacted that the President remains in office for seven years. But before the expiration of this term he may be removed by a vote of the people upon the motion of the *Reichstag*. Such a motion requires a two-thirds majority. If the popular vote is against the removal of the President, this is equivalent to his re-election and there is a dissolution of Parliament.

Plebiscites as to Alterations of Territory.—A peculiar feature of the Constitution of the *Reich* is the possibility, provided for in art. 18, of plebiscites on a question as to the territorial alteration of any of the German States. Such a plebiscite does not finally settle the question. It does not compel the *Reichstag* to take action, but it gives it power in its discretion to pass a law giving effect to the plebiscite, which may be to grant independence to a certain territory, or to incorporate one State or part of a State with another State or to combine several States into one. A law of this kind needs only a simple majority in the *Reichstag*.

Whether the *Reichstag* may itself direct that a popular vote should be taken in some part of the *Reich* on a question of this sort is a disputed point. So far as the written Constitution goes, it says merely the government shall order a vote to be taken if requested to do so by one-third of the voters on the register of voters for the *Reich* in the district to be detached.

Case of Hanover.—In accordance with this provision in the spring of 1924, the little "Hanoverian" party, which even to-day cannot reconcile itself to the annexation of Hanover by Prussia in 1866, brought in an Initiative. They demanded a plebiscite in the Prussian province of Hanover on the question whether Hanover should be independent of Prussia. As the "Application for Leave" (*Zulassungsantrag*) received the necessary amount of support, the government of the *Reich* was obliged to institute the "Collection of Signatures" (*Eintragungsverfahren*).[1] The local authorities in the province were charged during the first part of May of that year with the duty of collecting the signatures of the supporters of the motion. The result of this preliminary vote was, however, somewhat humiliating for the promoters. Out of about 1,760,000 voters in the district, only about 450,000 came forward, that is, roughly speaking, 150,000 less than one-third. There was—accordingly, no effective "Popular Request," and it was not necessary to take a plebiscite. This result may be explained in part by the fact

[1] See *supra*, p. 56.

that all the political parties take up the very sound position that no division of Prussia ought to be considered until the Rhineland has been freed from occupation by foreign troops.

Case of Schaumburg-Lippe.—The Hanover case was a question of *separation* from Prussia. On the other hand, in 1926 the Government of Schaumburg-Lippe sought to obtain by a "Decision of the People" amending the Constitution the authority to take proceedings for the *incorporation* of this too-small State with its great neighbour Prussia. The government of Schaumberg-Lippe and the majority of the *Landtag* were encouraged to take this step by the fact that a Referendum on the question of dissolution of the *Landtag* which had been brought about by the opponents of incorporation with Prussia had resulted negatively.[1]

It was, therefore, natural to suppose that the majority of the people must be in favour of this incorporation, and the more so, seeing that the financial position of this tiny State indicated that it could not continue to be self-supporting. But, instead of inviting the people to give a vote on the question in the manner provided in art. 18 of the Constitution of the *Reich*, the *Landtag* passed a law by way of amendment of the State Constitution declaring that there should be a Referendum on the question whether Schaumburg-Lippe should be joined to Prussia, and that if the result was affirmative, the government should be empowered to conclude a treaty with Prussia to that effect. Contrary to expectation, the Referendum taken on June 6, 1926, answered this question in the negative. On this occasion unreasonable sentiment and individual interests prevailed against sober consideration of the interest of the little State as a whole.

Principle of "Self-determination."—Plebiscites of this kind are concerned merely with readjustments of territory (*Neugliederung*) within the boundaries of the *Reich*, but art. 2 of the Constitution of the *Reich* recognizes in express terms the great democratic principle of the "self-determination" of nations. It runs: "The territory of the *Reich* consists of the territories of the German States. Other territories may be received into the *Reich* by a law if their population makes a request to that effect in the exercise of its right of self-determination."

II. Referendum in State Law.—The constitutional law of the German separate States is based on the principles of democratic parliamentary government laid down for them in art. 17 of the Constitution of the *Reich*. In details, however, the State Constitutions display great variations. It is natural that Prussia should have institutions peculiar to itself. That great State includes three-fifths of the total area of the German *Reich*. It has 36,700,000 inhabitants, whereas of the other 17 States, the three largest, Bavaria, Saxony, Würtemberg, have respectively 7,100,000, 4,700,000 and 2,500,000, while Schaumburg-Lippe, the smallest of them, has only about 46,000 people.

Prussia.—In Prussia a State Council (*Staatsrat*) is associated with

[1] See *infra*, p. 70.

the State Parliament (*Landtag*). The *Staatsrat* is formed on the model of the *Reichsrat* in the Federal Constitution. It gives representation to the *Provinciallandtage* of the different provinces (self-governing bodies), enabling them to participate in the legislation and administration of the State. The Prussian *Staatsrat* has the same rights to enter a protest against a law and to provoke a "Decision of the People" as the German *Reichsrat* has in the Federal Constitution.[1] There is, however, a difference as regards the checks upon increasing grants. In Prussia if the *Staatsrat* refuses to concur the Bill is lost; there is no right to take a Referendum. Politically speaking, this is the better rule. Financial questions are quite unsuitable for decision by popular vote.[2]

In other respects, too, the Prussian Constitution, as will appear presently, has special features. As is natural, considering the size of the country, the Constitution shows more unwillingness to submit questions to a Referendum, but the same unwillingness appears also in the Constitution of Saxony, and, even more markedly, in that of the Free City of Lübeck. It is true that the law of Lübeck admits "Decisions of the People" as to certain political questions, but despite the small population of the City State (120,000), it has no such thing as direct legislation either by "Popular Request" or by "Decision of the People."

In Prussia, so far, no decision of the people has taken place, and no "Popular Request" has been presented for the passing of a law or for the dissolution of the *Landtag*. It may be remarked that the preliminary steps for a plebiscite in Hanover which were mentioned above were taken under the law of the *Reich*.

No "Compulsory" Referendum in Most States.—According to the theory of radical democracy, it is indispensable that at least the Fundamental Law of the State—the Constitution—should be determined by popular vote and that every change in the Constitution should likewise be submitted to a Referendum. The supporters of this theory demand that there should be on these matters a compulsory Referendum. The German Constitutions, speaking generally, have rejected this view. They were able to do this without sacrificing the principle of popular sovereignty. For, when the new Constitutions were framed, there was absolutely no doubt that they were approved of by the majority of all the electors, men and women, represented in the Constituent Assemblies (*Nationalversammlung* and *Landesversammlungen*) which had been elected by universal suffrage, and according to the strict rules of pro-

[1] See *supra*, p. 59.

[2] The sound principle of checks on increasing grants by Parliament is derived from the English law. In Bavaria and in Würtemberg it is carried so far that in these States the *Landtag* cannot, if the government objects, increase a grant or introduce a new grant in the budget except by a two-thirds majority. See the comparative study by Dr. E. Braun, *Die Ausgabeinitiative des Parlaments in ihrer Entwickelung und Geltung* (*Archiv des öffentlichen Rechts, Neue Folge*, Band VI, 1924, pp. 42–92).

portional representation. And the same supposition is permissible as regards future alterations of the Constitutions. For the *Reichstag*, the *Landtage* of the fifteen States and the City Councils (*Bürgerschaften*) of the three City-States are all elected on a strictly democratic basis with proportional representation, and any law altering the Constitution requires a *special* majority. The general rule is to require a two-thirds majority in a House of which at least two-thirds of the members are present.

" Compulsory " Referendum in Baden and Hesse.—Two States have exceptional rules. In Baden the new Constitution was submitted to a Referendum and the Constitution lays down that every amendment of it must be confirmed by a Referendum, in which two-thirds of those who take part in the voting must be in favour of the alteration.

The popular vote taken on April 13, 1919, when the new Constitution in Baden was ratified by an overwhelming majority, was the first Referendum held on German territory. In Hesse no Referendum has been held, but as regards the future the law laid down that constitutional changes require ratification by the people by a special majority unless the law was passed in the *Landtag* by an almost unanimous vote, or, to be exact, by a majority of four-fifths.

One cannot say that the " compulsory " constitutional Referendum is proving a success. In Baden, for example, the Constitution had been framed somewhat hastily and it was soon evident that amendments were desirable. Moreover, the Constitution requires some modification in order to make it fit in with the Constitution of the *Reich*, which was of later date. But these amendments have been neglected on account of the expense which a Referendum would cause to the State, to the local authorities and to the political parties. In the *Reich* it would be intolerable if the expensive machinery of a Referendum of 39,000,000 electors had to be put in operation for every constitutional change. The Constitution of the *Reich* is necessarily a long and complicated document. Already numerous supplementary laws have been necessary as well as other modifications, and, no doubt, other changes will be found necessary in the future.

No German State has introduced the compulsory Referendum as to ordinary laws.

Special Rules as to Money Bills.—Before considering the rules as to " Popular Requests " for legislation and " Decisions of the People " in the several States, it is to be noted that in the States as well as in the *Reich* it was felt to be desirable to exclude " direct " legislation as regards money Bills, official salaries and the like. The State Constitutions, however, show considerable variations in regard to the strictness with which this principle is applied and as to the range of legislation excluded from a Referendum. Frequently all that is said is that on such matters no " Popular Request " can be received. This is so, for example, in Prussia and in Saxony. In Prussia the exclusion is conceived in terms

specially wide, for its Constitution says that with regard to questions of finance, money grants or official salaries no "Popular Request" is admissible (art. 6, par. 4).

This Principle extended in Some States.—Other States as regards these matters exclude not only a "Popular Request," but also any other way of appealing to the popular vote, while some of them extend the exclusion of "direct" legislation to certain matters not financial. For example, the Bavarian Constitution (art. 77) enacts "Excluded from 'Decisions of the People' are: (1) finance laws and laws concerning taxes and expenses; (2) state treaties; (3) laws as to settlements of frontiers; (4) laws relating to the creation of official posts or to the salaries of officials; (5) executory laws necessary to give effect to those laws of the *Reich* which order that they shall be executed by the States; (6) Laws earmarked by the *Landtag* as urgent."

Majority of Actual Voters and Majority of Electors.—In every kind of Referendum it is highly important to keep in mind the following distinction. Some Constitutions, for example those of Bavaria, Würtemberg, Baden, Hesse and Oldenburg, make a "Decision of the People" conclusive according to the answer given by a majority of the actual voters at the election, though some of them required that this majority shall be of a special kind—such as two-thirds. But, on the other hand, certain Constitutions, for example those of Prussia, Saxony, Thüringen and Bremen, make it essential in order that a "Decision of the People" shall be effectual that a majority of the voters on the register should have recorded their votes. Where this last requirement exists, as we have seen already in speaking of the Constitution of the *Reich*,[1] it becomes extremely difficult for a "Popular Request" to get the support necessary for it to be received, or to get a law passed by Parliament thrown out or to bring about a parliamentary dissolution by means of a "Decision of the People." The opponents of any such proposal have simply to stay at home and the practical result is that the supporters of the motion will fail unless they can bring to the polls a majority of all the electors on the register.

In considering the institutions which we are going to describe we must therefore keep in mind that there are always some restrictions upon "direct" legislation, though these restrictions vary considerably in the different States.

Procedure of Popular Initiative in the Various States.—Apart from Lübeck the popular initiative in legislation is allowed in all the States of Germany. As regards the procedure, the State Constitutions follow more or less closely the federal model. In all States the promoters (*Initianten*) must produce a complete Draft-Bill, and in most of them the procedure which has been described above under the name of "Application for Leave" (*Zulassungsverfahren*) has been copied. In Prussia and in Würtemberg (as in the *Reich* itself) 5,000 signatures must

[1] Cf. *supra*, p. 58, as to the *Reich*.

be affixed, whereas 1,000 are enough in Bavaria, Saxony and Thüringen. On the other hand, some States have at present no precise rules as to "Application for Leave." For example, in Baden and in Hesse (as in Switzerland) the promoters, as soon as they have published their Draft-Bill in the newspapers, begin to collect signatures in favour of it, and to request the local authorities to authenticate these signatures. In these States it is the promoters themselves who collect the signatures. The number of signatures required to make the "Popular Request" operative varies. In Prussia and in Hesse it is necessary to have one-twentieth of the voters on the register. But if the law proposed is one to alter the Constitution, the Prussian Constitution requires that the Request shall be supported by one-fifth of the voters on the register. As to "Popular Requests" in general, Bavaria, Saxony, Würtemberg, Thüringen and some other States require one-tenth of the electorate, while in other States the proportion necessary is one-fifth or one-sixth. Baden requires a fixed number of votes, viz. 80,000, which is at present rather more than one-twentieth of the electorate, and Oldenburg requires 20,000.

If the "Popular Request" receives the necessary support, the Draft-Bill is laid before the *Landtag*, and it is only when the *Landtag* refuses to pass it without amendment that a "Decision of the People" becomes necessary. The problem of the appropriate procedure to follow when the *Landtag* has amended the Bill has been solved in most of the States in the same way as in the *Reich*. Both the Draft-Bill and the amended Bill are submitted to the Referendum so that the people may reject both or may declare that either shall become law. In Prussia, on the other hand, in a case of this kind, the question put to the people is whether the Bill as drafted shall become law instead of the Bill as passed by the *Landtag*. The question here is put in a precise form, but one which considerably reduces the freedom of decision of the electorate. It would carry us too far to discuss how this case and similar complications, *e.g.* a competition between several "Popular Requests," are regulated in all the German States. In a good many of them no rules have so far been laid down in regard to them.

The law is passed if, in the Referendum, there is a majority in favour of it. But there are special rules as to constitutional laws. If the proposed law would alter the Constitution, several States, *e.g.* Prussia and Saxony, follow the example of the federal Constitution and require expressly that there should be a majority of all the voters on the register. Other Constitutions reach the same result indirectly by requiring that a majority of voters on the register shall have *taken a part in the voting*. This makes constitutional changes very difficult. In practice it is easier to make a constitutional change in those States such as Würtemberg, Baden and Hesse, which require for laws altering the Constitution two-thirds of the votes cast.

Instances which have Occurred.—"Popular Requests" for legisla-

tion have so far occurred only in two of the German States. In Hamburg in April 1921 a House-Tenants' Association prepared a Bill for Rent Restriction, and at the stage for " Application for Leave " procured the necessary 1,000 signatures. At the stage of " Collection of Signatures " (May 18–27), however, the promoters, out of 759,000 voters on the register, secured only 64,000 signatures. This being less than the requisite one-tenth, the Bill fell to the ground.

A singular case occurred in Bavaria in 1924. The " Bavarian People's Party " (*Bayerische Volkspartei*), which was the largest and the dominant party in the State, found itself compelled to bring about a " Popular Request " calling for the dissolution of the *Landtag* and for the election of a new *Landtag*, which for this time only should be empowered to make constitutional changes by Bills passed by a simple majority. Now, in Bavaria the *Landtag* can dissolve itself, but only by a vote of more than half of the members composing the Chamber (*not of the members present*). Alterations of the Constitution require in Bavaria the support of two-thirds of the members composing the Chamber. The Bavarian People's Party found itself unable to get these majorities because the groups which for most purposes voted with them refused their support in this case. As regards this " Popular Request " demanding the dissolution of the Bavarian *Landtag*, which will be referred to again later, the " Collection of Signatures " indicated so strong a feeling in its favour that the *Landtag* decided to dissolve without waiting for a " Decision of the People." The " Popular Request " to alter the Constitution at the stage of " Collection of Signatures " secured within the legal delay the support of 1,558,340 voters. The " Popular Request " became accordingly operative. The Draft-Bill was brought before the *Landtag*, but was rejected. The Referendum, thus rendered necessary took place on the right bank of the Rhine on April 6, and on the left bank on May 4. Out of about 4,280,000 voters on the register, rather more than 3,000,000 gave their votes, but of these about 160,000 were invalid for one reason or another. The valid votes in the affirmative were about 1,300,000, so that there was a majority in the negative.

Initiative calling for a Referendum.—Half-way between the principle of *representative* democracy, according to which legislative power is reserved exclusively for the Parliament, and the contrary principle of *direct* democracy, according to which a Referendum is compulsory, as it is in most of the Swiss Cantons, there is the compromise known as the " Initiative calling for a Referendum." Every " Initiative calling for a Referendum " is of a negative character. It is a sort of veto exercised by citizens opposed to a law which has gone through the Parliament who appeal in this way from the people's representatives to the people itself in order to bring about a " Referendum for Abrogating a Law " (*Verwerfungsreferendum*). In Germany this institution has been introduced by the Constitution of Baden (art. 23, par. 2) : " Every law not expressly excluded from the popular vote must be submitted to a

Referendum if a request to that effect is made within three months by the requisite number of citizens." Consequently, most laws have to lie on the table for three months before they can be promulgated. But a law is at once promulgated and is excluded from a Referendum if it has been declared " urgent " by a two-thirds majority in the *Landtag*. Strictly speaking, that should be done only in the case of " laws for the maintenance of the peace or for securing public health, public safety and good order." But in practice the rule has been for the *Landtag* to declare its laws to be " urgent " in order that they should be promulgated at once. Up to the present the people of Baden have made no use of the " Initiative calling for a Referendum."

In several of the other States there are similar provisions which in like manner have never yet been put into practice. So in Bavaria and in Würtemberg there may be a " Popular Initiative " against a law before its promulgation, but in both these States the *Landtag* can by a simple majority declare a law to be " urgent."

In Oldenburg, on the other hand, any law can be challenged in this way within three months, and this right cannot be taken away by declaring the law to be " urgent." In most of the States, including Prussia, Saxony, Hesse and the three Hanse Towns, the " Initiative calling for a Referendum " is unknown.

The State-Laws as a rule do not admit that combination of the right of a parliamentary minority to delay the promulgation of a law with the " Initiative calling for a Referendum " which, as we have seen, finds a place in the Constitution of the *Reich*. It was thought that sufficient protection was given by the fact that the abrogation of any law which had already passed in the *Landtag* might be demanded by a " Popular Request."

Referendum by Order.—There is complete lack of uniformity in the various States in regard to the institution which, in contrast with a Referendum at the *request* of a certain proportion of the electorate, may be described as " Referendum by Order." Instances occur in the State Constitutions of a Referendum which is ordered or imposed from above either by the government or by the State Parliament.

The following five cases are possible :

(*a*) The government may order a Referendum upon a law passed by the *Landtag*. This may be done in Bavaria, Saxony and Würtemberg unless the law has been earmarked as " urgent," and in Baden, Thüringen, Hesse, Hamburg, Mecklenburg-Schwerin and Lübeck it may be done without this restriction. In Mecklenburg-Strelitz we find the interesting modification that if the " Decision of the People " is in favour of the law, the Ministry must resign.

(*b*) In Brunswick it is not the government but the *Landtag* itself which can order a Referendum on the law which it has passed, so that here we have in the strict sense a case of *referre a collegio repraesentantium ad populum*.

(*c*) In Bremen both the government and the *Landtag* have the right to order a Referendum upon a law after its passing. And there are also some very complicated provisions which, in one instance, have been applied. On January 9, 1921, there was an appeal to a "Decision of the People" on the question whether the Senate should withdraw its opposition to a Bill. This was answered in the affirmative by 74,926 out of 209,735 voters on the register and in the negative by 100,471. Accordingly the Protest of the Senate against a Bill passed by the Chamber carried the day.

(*d*) In Anhalt and in Schaumburg-Lippe there is an *alternative* method. The government can protest against a law, and in that case it has to be voted upon a second time in the *Landtag*. If by simple majority the *Landtag* holds to its former opinion, the Bill falls to the ground unless it is ratified by a "Decision of the People" at the instance of the *Landtag*. On the other hand, if there is a two-thirds majority in the *Landtag* in favour of the law, it comes into effect unless it is abrogated by a "Decision of the People" at the instance of the government.

(*e*) In Prussia, Oldenburg and Lübeck there is no such institution as "Referendum by Order" whether the order be that of the government or the *Landtag*.

Referendum as to Dissolution of Landtag.—Up to the present time the kind of Referendum which has been most used is a Referendum which is brought about by a "Popular Request" on the question whether a State Parliament should be dissolved. There are in the German States several methods by which State Parliaments—most of which are elected for four years—may be dissolved before the expiration of this period.

(*a*) In some States the *Landtag* itself can decide to dissolve. This can be done in some of the States, *e.g.* Prussia and Hamburg, by a simple majority, whereas in other States, *e.g.* Saxony and Oldenburg, a two-thirds majority is required. Dissolutions have repeatedly been brought about in this way when a new election appeared to be desirable. In other States, *e.g.* Würtemberg, Baden and Hesse, the *Landtag* has no power to dissolve itself.

(*b*) As a rule there may be a "Popular Initiative" to have a "Decision of the People" on the question whether the *Landtag* should be dissolved—*Auflösungsbegehren* followed by *Auflösungsreferendum*. The conditions are generally the same as those for an Initiative to bring in a law. Some States, however, have special rules for this case, *e.g.* Prussia requires for a "Referendum for Dissolution" that there shall have been a "Popular Request" signed by one-fifth of the voters on the register, whereas a "Popular Request" for a Referendum to bring in a law requires the support only of one-twentieth of the voters on the register.

Instances which have Occurred.—So far there have been six cases in all of these "Initiatives for Dissolution." In Saxony in the year 1922

the Conservative opposition brought about an "Initiative for Dissolution." The result of the "Collection of Signatures" was that 818,797 signatures were obtained in favour of the motion, being more than 26 per cent. of the electorate. Thereupon the *Landtag* on September 4 decided upon a dissolution, so that it was not necessary to have the Referendum. In Bavaria the "Initiative for Dissolution" instituted by the "People's Party" in January 1924 on the grounds already alluded to [1] received the support of 1,158,340 valid signatures, being more than the necessary one-fifth of the electorate of about 4,280,000 voters. In this case also the *Landtag* thereupon dissolved itself. In Brunswick at the beginning of 1924 the "German National Party" instituted an "Initiative for Dissolution" coupled with a motion for reducing the number of deputies. The *Landtag*, instead of fixing a period for the "Collection of Signatures," passed a law enacting that there should be a "Preliminary Vote of the People" which was to be taken on the same day on both these questions. At this "Preliminary Vote" taken on June 13, 1924, out of 324,165 voters on the register 75,144—that is, much more than one-tenth—voted in favour of the dissolution. About 6,000 votes were cast against it, and there were about 950 spoilt votes. It is not necessary to explain the reasons why the Referendum thus made necessary was fixed for a date as late as November 30, 1924, seeing that in point of fact it never took place at all. Early in November the *Landtag* passed a law (by the requisite *special* majority) enacting that there should be no Referendum unless this was demanded by at least 100 of those who signed the "Application for Leave," and enacting at the same time that the *Landtag* should dissolve itself. The promoters of the Initiative were satisfied with these results of their efforts, and the more so because at the beginning of the year they had found it extremely difficult to procure in favour of the "Application for Leave" the 2,000 signatures required by the law of Brunswick, or at any rate 2,000 signatures voluntarily given and properly certified.

In Schaumburg-Lippe in 1924 a "Popular Request" for dissolution, which was successful, obtained 11,000 signatures out of an electorate of 29,000 or thereabouts. Its object was to bring about a new election which should turn on the question whether the little State was to remain independent or whether it should be incorporated with Prussia. A "Decision of the People" took place on August 24, 1924. Less than 50 per cent. of the electors cast their votes, 11,598 voting "Yes" and 618 voting "No." As in Schaumburg-Lippe, a "Decision of the People" is not effective unless half the electorate take part in it; those who were against the dissolution, having received sound legal advice, simply stayed at home, and, by so doing, secured the failure of the Referendum. The subsequent developments have been alluded to above.[2]

A "Popular Request" of a very petty character was presented in December 1925 in Mecklenburg-Schwerin, but came to nothing, as it

[1] See *supra*, p. 67.

[2] *Supra*, p. 62.

well deserved to do. A Bill in the *Landtag* for simplifying the system of local government would have deprived some small towns of their status as court-towns (*Amtsstädte*). Out of fear of this result some of the inhabitants of Bützow got up an agitation to bring about a dissolution, hoping to overthrow the government which cherished these nefarious designs. It got as far as a "Collection of Signatures," but came to grief at that stage. Out of 404,000 electors (in round numbers), only about 30,000 supported the "Popular Request," *i.e.* far less than the proportion of one-sixth required in Mecklenburg-Schwerin to make a "Popular Request" effective.

A political fight for a "Referendum upon Dissolution" in Hesse in 1926 excited much feeling. A "block" formed out of the parties of the "right," calling itself the "Block of Order and Good Government," promoted a "Popular Request" in the hope that a new election would give them a majority. By the end of the delay allowed for the "Collection of Signatures" they had been able to produce lists signed by nearly 169,000 voters in favour of dissolution. When, however, the Committee of the *Landtag* whose duty it was to examine these lists reported upon them, the report disclosed a mass of irregularities unprecedented in German experience. More than 80,000 of the signatures were not in the handwriting of the persons whose names they purported to be. Some of the names were those of foreigners, and in thousands of cases the signatures had not been authenticated by the local authorities, while in other cases, less numerous, but nevertheless disgracefully frequent, over-zealous citizens had not scrupled to sign several lists. The promoters, in their desire to palliate these irregularities, urged that they must be ascribed merely to ignorance and carelessness, and that the examining committee in its wholesale condemnation had exhibited a bureaucratic narrowness of outlook. On the other hand, the Socialist press, in its turn resorting to exaggeration, declared that the "Block of Order" had of set purpose been guilty of fraudulent methods and falsification of documents. The legal question was raised whether the "Popular Request" must fall to the ground or whether it was permissible and was the proper constitutional course to send back the defective lists to the local authorities in order that they should be corrected and completed. The opinions of experts in constitutional law were obtained upon this point and they gave their opinion in favour of allowing the lists to be revised. After this revision had been made, the Committee of the *Landtag* came to the conclusion that out of 168,742 signatures not less than 90,864 must be definitely declared invalid, and that in addition there were 15,879 signatures which the local authorities had been asked to investigate as to which no further information had been vouchsafed. The valid signatures amounted to 61,999, a number sufficient to make the "Popular Request" effective. The whole affair was extraordinary and by no means cheering, but it showed at any rate that such cases in Germany are examined carefully and conscientiously and

that compliance with the legal requirements is strictly enforced. The consequent "Referendum on Dissolution" was held on December 5, 1926. In spite of passionate agitation, only 427,359 electors voted out of a total of 876,255. The votes "Yes" were 202,326, those "No" 219,845, and there were 5,188 spoilt voting papers. This failure was all the more disappointing to the promoters because the Communist party had joined forces with them in demanding a dissolution.

(*c*) In Prussia the *Staatsrat* has the right to bring about a "Decision of the People" on the question whether there should be a dissolution of the *Landtag*. Moreover, a Committee consisting of the Prime Minister, the President of the *Landtag* and the President of the *Staatsrat* can by a majority order a dissolution without the necessity of a Referendum.

(*d*) Finally, in most of the German States the government has the power to appeal to a "Decision of the People" as to a dissolution of the *Landtag*. This method will be explained presently.

Initiative as to summoning Landtag.—It must be added to make the account complete that in some of the German States there can be an effective "Popular Request" for the *summoning of the Landtag* without the necessity of a "Decision of the People." Thus, in Bavaria the *Landtag* must meet for an extraordinary session if this is requested by one-fifth of the voters on the register, and by the Constitution of Baden the *Landtag* must be convoked if this is demanded by 80,000 electors.

Power of Government to bring about Dissolution.—In the *Reich* the only way in which the government can bring about a dissolution of the *Reichstag* is by making a recommendation to this effect to the President of the *Reich*. The President *may* thereupon issue the decree for dissolution, but he is not bound to do so. In the State Constitutions this matter is regulated in various ways.

(*a*) In Bavaria, Baden and Thüringen the government has no direct power to bring about a dissolution. In Prussia the Prime Minister (*Ministerpräsident*), if a vote of want of confidence has been carried, has power merely to propose to the above-mentioned Committee of the three Presidents that there should be a dissolution. The State government in Prussia cannot order a Referendum as to dissolution.

(*b*) On the other hand, several of the State Constitutions give to the government the right to order a "Decision of the People" on the question whether the *Landtag* should be dissolved. In the interval between the publication of the order for a Referendum and its execution the Parliament is not allowed to overthrow the government by a vote of want of confidence. And, conversely, it follows that after a vote of no confidence has been carried the government in these States is bound to resign at once. It has no longer the power of ordering a "Decision of the People"—on the question of dissolution. It can use this weapon against the slipping away of its parliamentary majority only if it is adroit enough to anticipate the impending vote of no confidence by ordering a "Decision of the People."

Some of the small States go further in the direction of curtailing the powers of a parliamentary majority. They authorize the government even after a vote of no confidence has been carried to appeal to the people to decide the question whether the government should resign or whether Parliament should be dissolved.

In November 1923 the Assembly (*Bürgerschaft*) of Lübeck passed a vote of want of confidence against the Governing Council (*Senat*). The Council, without resigning, fixed a "Decision of the People" for January 6, 1924, on the question, "Should the Council resign?" Out of 84,462 electors, 73,736 valid votes were given, 29,596 answering "Yes" and 44,140 "No." There were 322 spoilt papers. The result of the voting was that the Council remained in office and that the Assembly was dissolved and a new election held in accordance with art. 14 of the Constitution.

In Oldenburg the powers of the government in this regard are even greater. After a vote of no confidence has been carried against it, the government has the choice between resigning or dissolving the *Landtag* without the necessity of appealing to a popular vote.

Conclusion.—Upon the whole matter it is fair to say that up to the present the German people have made a modest and in the main a reasonable use of their new powers of "direct" action in politics.

There is every reason to expect that this moderation in resorting to the "Popular Initiative" and the Referendum will continue to be shown in future so long as the principle of proportional representation is applied in the *Reich* and in the States. This system secures a pretty close correspondence between the strength of parties in the Chamber and in the country. If the system of proportional representation were to be done away with or to be seriously modified, we should expect to see a marked increase in the number of "Popular Requests," Referendums, Protests by the *Reichsrat* or the *Staatsrat* as the case may be, and, especially, of Initiatives and Referendums on the question of dissolution of Parliaments.

Some readers may think the foregoing sketch overloaded with detail, while possibly others may regret that some of the special points and peculiar features of this part of the German Constitution have not been noticed. For their benefit it may be mentioned that in addition to the works on the new German constitutional law in general there are valuable special studies on the Referendum.[1]

[1] Cf. Stier-Somlo, *Deutsches Reichs- und Landes-Staatsrecht*, Bd. 1 (1924), s. 525 *seq.*; Anschütz, *Kommentar zur deutschen Reichsverfassung*, 3. u. 4. Aufl. (1926), s. 223. More recent special works are Kaisenberg, *Volksentscheid und Volksbegehren* (*Kommentar zum Reichsgesetz über den Volksentscheid*), 2. Aufl. (1926); K. Kullmann, *Sinn und Gestaltung der Volksabstimmungen im deutschen Landesstaatsrecht*, Dissert. jurid. Heidelberg (1926); Carl Schmitt, *Volksentscheid und Volksbegehren* (1927). The constitutional laws of the German *Reich* and of the German States are published together by O. Ruthenberg (Berlin, 1926).

PRODUCE POOLS IN AUSTRALIA.

[*Contributed by* Professor F. R. Beasley, *of the University of Western Australia.*]

The collective marketing of primary products was almost unknown in Australia prior to the outbreak of the War. Private enterprise on the whole treated the producer reasonably, and the few co-operative societies which did exist were relatively unimportant. To a country which exports most of its agricultural and pastoral products and is very remote from the principal markets of the world, the War taught certain lessons, and chief among them that in abnormal times its dependency upon the foreign buyer makes imperative some form of collective selling. Pooling came into existence from national necessity, not from the deliberate choice of Government or grower ; between pooling and loss, if not ruin, for most of the producers there was no middle course. Extraordinary times required extraordinary measures ; the marketing methods adopted from 1915 to 1920 gave the producer a new experience, and it is small wonder that some, at any rate, especially those who became producers during that period and in consequence had never known any other system, were loud in their demands for a continuance of pooling after Governments had decided that the return of normal conditions justified their relinquishing control of the selling organization.

Farmers share with all producers, whether in primary or secondary industries, a deep-rooted suspicion that the middleman's profit is disproportionate to his services ; for that reason they are usually ready to give a patient and hopeful hearing to any practical suggestion for eliminating this one of the links between producer and consumer. A co-operative pool seems to offer the most possibilities of ensuring that a part at least of the profit usually accruing to the merchant shall be returned to the grower instead. Unfortunately realization often lags behind expectation ; profit is the merchant's life-blood and obliges him to maintain a high standard of efficiency, thus providing a stimulus which is absent from the operations of the pool. Furthermore, the merchants do not act in combination except to a certain extent in the wool market ; one must as a rule vie with another in offering prices that will attract custom. On the other hand, the pool must necessarily fix its first advance to the grower at a level considerably lower than the selling price which it hopes to realize ; it must assess its expenses at an arbitrary figure and deduct them at the outset ; it must make arrangements to finance its operations, and the rate of interest it will have to

pay for accommodation may increase with the extent of its dealings. The voluntary pool is only a trustee for sale, and the beneficiary finds that any diminution of his crop between the times of delivery to the pool and of realization means a loss to him, whereas this is a liability shouldered every day by private enterprise. In the case of wheat, mice and weevil may ravage the stored crop: climatic conditions may and very often do cause a marked variation in the weight of the crop as delivered and its weight on selling day, as the Government of New South Wales found to its cost when it took part in the compulsory pool of the war days. The wheat-farmer who prefers to keep aloof from the voluntary pool can sell outright to a local agent or to a metropolitan merchant; alternatively he can have his crop stored free of charge at buyer's risk, obtain an advance at an interest rate which rarely equals and never exceeds the rate paid by the pool to its bankers, and direct the merchant to sell whenever he regards the market as satisfactory. The merchant is in fact working all the time on the narrowest margin of profit when dealing in an exportable commodity, and the producer benefits accordingly.

No one appreciates more than the grower himself that pooling was his salvation during the War; it is equally the fact that no one is more wide awake to the defects of governmental control. Compulsory pools are out of favour; the battle still rages round the voluntary system. The producer is only human, after all; and his attitude towards pools is largely conditioned by his own experience. He is told that he is a producer, not a speculator; that if he does the producing, others will attend to the marketing at their risk and not at his. If he has been fortunate enough to sell at a time when prices were good, he agrees, and has no fault to find with private enterprise; the shoe only begins to pinch when he finds himself selling in a glutted and falling market. Then he is once more attracted by pooling schemes, and is easily persuaded that a collective selling agency would be able to choose both its market and its price; but the local consumer interferes with a complaint that pooling always means an artificial increase in the price of that portion of the product which is sold at home, and private enterprise is not slow to suggest that selling rings may be countered by buying rings which are able to hold out longer than the seller unless the latter has a virtual monopoly in his product, which is seldom if ever the case. The grower's chief concern is to get as good a price as possible for his product, and to get it quickly; if values are low, the pool is at a disadvantage because its first advance must be small and the grower may have to wait for months for further dividends, whereas the merchant pays in full and at once; when the market is good, the farmer is generally satisfied with the price offered by the merchant and does not worry himself over the fact that by delivering his product to the pool and waiting some time longer for a final settlement he might have had an even better return.

Wheat Acquisition Act, 1914.—The first compulsory, Government-controlled pool was that set up in New South Wales in 1914 by the Wheat Acquisition Act, which gave the Executive power to declare by proclamation that all or any specified part of the New South Wales 1914–15 harvest was acquired by the Crown. One disadvantage under which all State pooling legislation labours is the liability to be declared unconstitutional on the ground of conflict with s. 92 of the Commonwealth Constitution, which enacts that " trade and commerce among the States . . . shall be absolutely free " ; in many cases State pools must *prima facie* interfere with interstate traffic in the pooled commodity, and if the enabling Act expressly excepts interstate contracts from its operation, some portion of the commodity produced within the State will be outside the pool. The Wheat Acquisition Act was expressed to be limited in its application to contracts made in the State for performance within the State ; its validity was challenged before the Interstate Commission, which pronounced against it, but this decision was reversed on appeal to the High Court,[1] and a similar ruling was given on appeal from the Supreme Court of New South Wales in *Delaney* v. *Great Western Milling Co., Ltd.*,[2] where a Victorian merchant who had purchased New South Wales wheat through his Sydney agent sued the vendor for damages for non-delivery. Acts passed in New South Wales and Queensland (the Meat Supply for Imperial Uses Acts of 1915) to control the export of meat were similarly challenged ; these Acts provided that all stock and meat were to be held at the disposal of the Crown, and that upon a Ministerial order being made all stock and meat mentioned therein should become the property of the Crown. In *Foggitt, Jones & Co., Ltd.* v. *State of New South Wales*[3]—the " Pig Case "—a company incorporated in Queensland moved for a decree against the Commissioner of Railways for New South Wales, who, acting under the instructions of the Attorney-General of that State, refused to supply trucks to enable the plaintiffs to move their pigs from New South Wales to Queensland. No order had been made vesting the pigs in the Crown, and the High Court held that until such order there was no expropriation and no right in the State to prevent the plaintiffs from dealing freely with their own property. In the following year, however, a case arose on identical provisions in the Queensland Act, reported under the name of *Duncan* v. *State of Queensland* in 22 C.L.R. 356 and known as the " Mooraberrie Cattle Case " ; the High Court refused to follow its earlier decision in the " Pig Case " and decided in favour of the State, Griffith C.J. stating in explanation of this change of front that " that case [the ' Pig Case '] was very briefly and, I regret to say, insufficiently argued and considered on the last day of the Sydney sittings. The arguments which now commend themselves to me as conclusive did not then find entrance to my mind. In my opinion, that case was wrongly decided, and should

[1] *State of New South Wales* v. *The Commonwealth*, 20 C.L.R. 54.
[2] 22 C.L.R. 150.
[3] 21 C.L.R. 357.

be overruled." In the interval between the two cases the High Court had had occasion to rule that the Commonwealth had power, under the provisions of the Constitution relating to defence, to fix within limits of locality the highest price which during the continuance of the War might be charged for bread,[1] and it is perhaps neither unreasonable nor disrespectful to suggest that the Court had come to consider that the exigencies of the War demanded greater latitude in the interpretation of the relative powers of Commonwealth and State.

Leading Cases Relating to Pools.—The leading cases relating to pools are few in number ; in addition to the foregoing there have been adjudications on the validity of a Queensland fruit pool and on subsidiary points arising out of other pools. In *The Committee of Direction of Fruit Marketing* v. *Collins*,[2] the respondents successfully contended that s. 7 of the (Queensland) Fruit Market Organization Act, 1923, which provides that the Committee established by the Act shall take control of the marketing of all fruit grown in Queensland, gives to the Committee the right only to regulate and supervise the marketing of such fruit by other persons and not itself to market such fruit. Had such right been given, it might have conflicted with s. 92 of the Commonwealth Constitution and the Act on that ground would have been bad. *Welden* v. *Smith*,[3] was a case arising out of the Wheat Harvests Acts, 1915–17, which made provision for wheat-growers in South Australia to hand over their crops for sale by the Government, the price to be dependent upon the aggregate amount received for all wheat in each year so delivered and sold ; the Government was held responsible for the loss occasioned by its negligent storing of the wheat, which resulted in the aggregate price realized being considerably reduced. The *Crown* v. *McNeil*[4] decides that where the Government makes delay in payment of the amounts due to persons who have entrusted their products to it for realization, interest is recoverable from the date when such amounts should have been paid.

Legislation in Queensland.—Since the War Queensland has shown itself the most active of the States in its pooling legislation. Its first Act of this nature, the Wheat Pool Act of 1920, requires all wheat to be delivered to the Board established thereunder and avoids all contracts —other than interstate contracts—for the sale of wheat and flour ; the Act is still in force, but is relatively unimportant, Queensland not being a large wheat-producing State. Of greater importance is the Primary Products Pools Act of 1922, which provides that the Governor in Council may, upon the recommendation of the Council of Agriculture, or if requested so to do by a representative number of growers or by an organization representative of the growers, declare any grain, cereal, fruit, vegetable or other product of the soil in Queensland or any dairy produce or article of commerce a " commodity " for the purposes of

[1] *Farey* v. *Burvett*, 21 C.L.R. 433.
[2] 36 C.L.R. 410.
[3] [1924] A.C. 484.
[4] [1927] A.C. 381.

the Act. Thereupon all the commodity is to be delivered to the Board established to market it ; with certain minor exceptions all sales except to the Board are prohibited. Contracts for the sale of the commodity for delivery in or out of Queensland are void after publication of a notice to that effect in the *Gazette* ; there is the usual proviso excepting interstate contracts from the operation of the Act. Under this Act the following pools have been set up for varying periods : Maize in the Atherton district, from July 1, 1923, to June 30, 1924 ; Eggs, from June 1, 1923, to November 30, 1925 ; Butter, from February 19, 1925, to February 18, 1928 ; Atherton district Pigs, from January 1, 1926, to December 31, 1930 ; Peanuts, from April 17, 1925, to June 30, 1932 ; Canary Seed, for the 1924–5, 1925–6, and 1926–7 seasons ; Arrowroot, as from December 1, 1922 ; and Cheese, from August 31, 1923, to June 30, 1924. It will be observed that no attempt has been made to control the larger primary industries, such as wool, cattle and sheep.

In 1923 the Fruit Marketing Organization Act was passed ; it is provided that the Primary Products Pools Act shall not apply to any operations under this Act and that no pool of fruit shall be created ; a Committee of Direction is established to take control of fruit marketing, the powers of this body being subsequently subjected to judicial examination in *The Committee of Direction of Fruit Marketing* v. *Collins*.[1] Legislative provision for the proper organization of voluntary pools was made in the Primary Producers' Co-operative Associations Act of 1923 ; such an association, which must be registered under the Act, may be established for the purpose *inter alia* of selling and disposing of the primary products of its members in the most profitable manner. Associations registered under the Act may adopt without alteration the model rules contained in the Schedule, or they may amend the model rules subject to the requirement that certain particulars required under s. 15 of the Act must be included. The formation of such associations is encouraged by various restrictions upon the activities of unregistered societies.

New South Wales.—This State showed a decided preference for the continuance of the compulsory wheat-pooling scheme which was in force during the War, but the Legislative Council was of a different mind from the Government of the day. Since that reverse in 1921, no attempt was made until recent months to introduce any legislation whatever with regard to compulsory pools ; under the present Government the Marketing of Primary Products Act was passed in 1927. The Act can be made applicable to any product other than wool or dried fruits ; primary producers claim to find many objectionable features included and some surprising and inauspicious omissions. Any Board established under the Act consists of not less than five members, three producers and two Government nominees—the Director of Marketing, who is a public servant, and a consumers' representative. The chief defects of the Act are the absence of any mandatory provision that

[1] Vide *supra*.

the accounts of each successive pool must be kept and liquidated independently, and, from the producers' point of view, the omission of satisfactory provisions with regard to the method of choosing their representatives. A further objection is taken to the presence of a Government officer on every Board.

Wool is not likely to be pooled unless abnormal conditions recur; the other exception from the operation of the Marketing of Primary Products Act, namely, dried fruits, received special attention in a separate enactment also passed in 1927. The Dried Fruits Act may in some respects be regarded as supplementary to the Dried Fruits Export Control Act passed by the Commonwealth Parliament in 1924. Provision is made for the registration of growers, dealers and packing-sheds; a Board is to be established with a chairman nominated by the Governor and two other members representing the growers; the Governor is empowered to purchase or compulsorily acquire any dried fruits which are not held for export under and in accordance with a valid and existing licence granted under the Commonwealth Act. S. 2 defers the operation of the Act until, at a poll at which 70 per cent. at least of the registered growers record their votes, the majority are in favour of the system proposed by the Act; a poll was duly held, the results of which were published on September 14, 1927—84·38 per cent. of the growers voted, 287 being in favour of the system and 100 opposing it. Action will now be taken to constitute a Dried Fruits Board in accordance with the Act. This enactment is similar to legislation passed in December 1924 in Victoria and South Australia, which States have since made frequent requests to New South Wales and Western Australia (the only other States where these dried fruits are produced) to introduce the control system. Western Australia complied earlier in the year, so that the marketing of vine dried fruits is now under control throughout the Commonwealth.

New South Wales has a Co-operation, Community Settlement and Credit Act (passed in 1924 and amended later in the same year) which encourages *inter alia* the creation of voluntary pools in the form of co-operative associations established for the express purpose of marketing the products of its members. The creation of such associations is governed by rules closely analogous to those appertaining to the incorporation of trading companies, but restrictions are placed on the number of shares any one member may hold and the proportion of an individual holding to the total capital, upon the transfer of shares without the consent of the board of management, upon the amount of dividend payable and upon the disposal of the surplus profits. In order to benefit by the Act a co-operative association must be registered, and the use of the word "co-operative" is forbidden to unregistered bodies. Exemption from income-tax is granted in respect of undistributed profits and of profits allocated among members by way of bonus or rebate on the amount of business done by each with the society, provided

that, in order to entitle the society to this latter exemption, 90 per cent. of its business must be done with its own members. No fees are payable on registration, nor is stamp duty chargeable upon the certificate of incorporation, share certificates or any document issued in connexion with the capital of the association.

The Commonwealth.—The pools established and controlled by the Commonwealth during the War, namely, wool, sheepskins, flax and dairy produce, were created not by legislative act but by regulation under the War Precautions Act; the wheat scheme was the result of agreement between the Commonwealth and the wheat-producing States. Provision was made by the Commercial Activities Act, 1919, for the continuance of all these pools under the same conditions as obtained during the war period; control of wool, sheepskins and wheat was relinquished on and after June 30, 1920. The Flax Pool was established with the object of increasing production rather than of controlling the sale of the output; the entire Australian crop is grown in Victoria and represents an average annual value of £25,000, compared with imports of flax products worth £1,800,000 yearly; control ceased in 1920, although the Commonwealth Government continued to guarantee in each season a fixed minimum price per ton of the output. The activities of the Dairy Produce Pool were limited to the period July 1, 1918, to March 31, 1921, during which time the total surplus production was sold to the British Government at prices varying with quality; from July 1, 1918, to July 31, 1920, the price was 175*s.* per cwt. for butter scoring 90 points, 1*s.* per cwt. being added or deducted for butter superior or inferior to that standard, and from August 1, 1920, to the termination of the contract the price was first of all 240*s.* per cwt. and later 272*s.*, with an addition or deduction of 1*s.* 6*d.* per cwt. From 1921 to 1924 butter was "free"; in the latter year the Dairy Produce Control Act was passed to provide for the constitution of a Board empowered to control the shipment of butter to any place beyond the Commonwealth. The Act was not to come into force until a majority of votes had been given in its favour at a poll of producers; the poll having been held and the requisite majority obtained, the Act was proclaimed on February 23, 1925. It provides for a board composed of a Government nominee, representatives from each State, members elected by the boards of directors of proprietary butter and cheese factories, and a person appointed by the Governor-General to represent selling organizations outside Australia. This Board controls all exports of dairy produce, and works in co-ordination with the Australian Dairy Council, which in turn is assisted by a Dairy Advisory Board in each State. Production has, from January 1, 1926, been subject to the "Patterson Scheme" for stabilizing the internal market. This scheme provides for a levy on all butter produced and for a bonus on butter exported; at present the levy is 1½*d.* and the bonus 3*d.*, per lb., and any balance remaining after payment of the export bonus is refunded

to the producers. The object of the scheme is to diminish interstate competition in the home market and to promote the sale of Australian butter abroad.

The Commonwealth has also passed the Dried Fruits Export Control Act of 1924, which came into operation on February 6, 1925, after a majority of the growers throughout Australia had duly voted in favour of the control system ; a Board is established for the purpose of selling Australian dried fruits—currants, sultanas and lexias—in overseas markets, exports being prohibited except by the Board itself or under licence from it. Power was also given by the Act to set up a London agency of the Board for the purpose of disposing of Australian dried fruits in London and elsewhere. In 1926 the system was extended to canned fruits by the Canned Fruits Export Control Act, a similar Board with identical powers being established thereby ; in 1927 a Fresh Fruit Overseas Marketing Act was passed, and the necessary poll of the growers was held on September 28, 1927. Each of these Acts has been followed by supplementary legislation to make provision for the expenses of the various Boards. In all cases a small levy has been made on the exported product with power reserved to alter the rate by regulation. The levy on butter was originally one-eighth of a penny per lb., which was later reduced to one-sixteenth of a penny, and now a recommendation has been made by the Board that the rate should be one-twentieth of a penny ; on cheese, one-sixteenth of a penny, then one-thirty-second, one-fortieth of a penny now being recommended ; on dried fruits, one-eighth of a penny per lb. ; on canned fruits, one farthing on every thirty ounces ; and on fresh fruits one penny per case. The Commonwealth Treasurer has power under the Export Guarantee Act of 1924 to guarantee to the Commonwealth Bank or any other prescribed bank doing business in the Commonwealth the repayment, in an amount not exceeding 80 per cent. of the market value of the produce in respect of which an advance has been made, of advances made by such banks to any Board in connexion with the financing of exports under the various Acts. Under the Commonwealth Bank (Rural Credits) Act, 1925, the Treasurer may lend money to the Rural Credits Department of the Commonwealth Bank to be used in making advances on primary produce to (*a*) the Commonwealth Bank itself or other banks, (*b*) co-operative associations legally established or (*c*) any other corporations or unincorporate bodies as may be specified by proclamation. Advances are not to be made for more than one year, and the total of the sums lent by the Treasurer and not repaid must not at any time exceed £3,000,000.

The various Acts creating Export Control Boards do not set up all-embracing pools, as the Boards have in the past been ready to sanction f.o.b. and c.i.f. contracts ; they do, however, create organizations which are able to prevent the export of produce of inferior quality and to assist the grower to obtain a better return through co-operative marketing.

(*To be concluded.*)

THE PRINCIPLES OF THE JEWISH LAW OF PROPERTY.[1]

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THE aphorism of Savigny that in Roman law "property is founded on adverse possession ripened by prescription," although it is true of English law, cannot be applied to Jewish law.[2] For already in the biblical code the notion of property is fully recognized, while to possession as such no protection is granted. The proposition of Ihering, stated with reference to Roman law, seems to be applicable to Jewish law, viz., that "Possession in its practical bearing is rightly described as an outwork of ownership." Hence the present inquiry must primarily be of ownership. For possession is the outward expression of real or apparent ownership: "Any usual external condition of the thing in which it serves the purposes of an owner." "Its external form varies for different things and its existence in each case is a matter of experience."[3]

Sources of Jewish Law.—At the outset, an account of the sources of Jewish law may be of interest. The first codification is found in the *Pentateuch*, the basis of which is certainly Mosaic (*circa* 1,400 B.C.). The *Mishnah* (made in 3rd cent. A.D.) is a Palestinian code of the law as developed for many centuries, first by the Scribes (*Soferim*) and then by the early rabbis (*Tannaim*). There follows that Digest of Jewish law put together in the sixth century—one version in Palestine, the other in Babylon—called the *Talmud*. Embedded in this, with much else of history and homily, science and folklore, is a huge mass of case law decided by the rabbi-judges. This crystallized a new development of the ancient Jewish common law. But the Digest is profuse and chaotic. Thrice was it later systematized by rabbinical lawyers. *Maimonides* in Egypt in 1180 co-ordinated the law in his comprehensive code, *Mishne Torah*[4]; *Jacob ben Asheri* in 1340 wrote the *Tur* in Spain[5];

[1] Paper read before the Society for Jewish Jurisprudence, in the Inner Temple, on January 31, 1927.

[2] Cited in Maine, *Ancient Law*, ed. Sir F. Pollock, pp. 267, 314.

[3] Cited by J. M. Lightwood, "Possession in Roman Law," *Law Quarterly Review*, vol. iii, pp. 32, 44, 48, 49. And see Henry Bond, "Possession in Roman Law," *ibid.*, vol. vi, p. 259.

[4] Graetz, *History of the Jews*, trans. by Bella Lowy, vol. iii, p. 481; Maimonides, by David Yellin and Israel Abrahams, p. 85; *Jewish Encyclopedia*, vol. ix, p. 84.

[5] Graetz, vol. iv, p. 95; *Jewish Encyclopedia*, vol. vii, p. 28.

and finally, in Palestine in the sixteenth century, Joseph Karo wrote the *Shulhan Arukh*.[1] Thus, in the course of thirty centuries, Jewish law has grown from a code and early *dooms* into a highly refined system.

The recognition of Jewish law has varied according to country and to epoch. Jewish criminal law ceased to be completely effective before the destruction of the Second Temple (A.D. 70). Jewish litigants in civil cases were originally forbidden by Jewish law from bringing their cases before a non-Jewish Court. But, after Maimonides' time, the prohibition fell into desuetude. In suits between Jew and non-Jew the principle applicable was that "the law of the land is the law."[2] Registration of deeds in non-Jewish Record Offices was known in Talmudic times.[3] In mediæval times certain European Jewish communities had a limited legal autonomy. Thus in Galicia and Russia from the seventeenth to the nineteenth century a *Beth Din* (or Court) composed of rabbis and elders tried cases between Jew and Jew, guided "not only by the general law of the state, but also by the Jewish common law."[4] In 1804 Russian Jews were made subject to the jurisdiction of the Russian Courts, but Jewish law was recognized in marriage and succession. In England Jewish law emerges in the Courts chiefly in the question of marriage. But a Jewish *get* or bill of divorcement cannot operate to allow parties domiciled in England to remarry, who are not divorced according to English law.[5] In the East, however, the old principle still, to a great extent, lives on, viz., that in the matters of personal status the person is governed by his religious law. Hence in Egypt, and until recently in Turkey, rabbinical Courts applied rabbinical law in dealing with such matters as "marriage, inheritance, and other questions involving religious law or custom."[6] And in Palestine to-day, rabbinical Courts have in certain matters of personal status, exclusive, in other matters, concurrent, jurisdiction. In the Jewish settlements there, Jewish litigants usually submit their disputes to a Hebrew Arbitration Court, called a Peace Court.[7] Thus, although not equally vital in every country and for every purpose, Jewish law is a "living law."

The sources of the Jewish law of property are diverse. First, scattered through the Hebrew Bible are references to legal terms and conveyances. Then, the first *Mishnah* in *Kiddushin* and the fourth in *Baba Mezia* form together the *locus classicus* for *Kinyan* (mode of acquisition). Next, in various treatises of the *Talmud*, laws lie in profuse dis-

[1] Graetz, vol. iv, p. 651; *Jewish Encyclopedia*, vol. iii, p. 585.

[2] See *Jewish Encyclopedia*, vol. iv, p. 224, art. "Conflict of Laws."

[3] *Legacy of Israel* (Oxford, 1927), p. 399, art. "Influence of Judaism on Western Law," by Professor N. Isaacs.

[4] *History of the Jews in Russia and Poland*, by S. M. Dubnow (Jewish Publication Society of America), vol. i, pp. 46, 191, 309, 310.

[5] *Preger* v. *Preger*, [1926] 42 T.L.R. 483.

[6] *Sasson* v. *Sasson*, [1924] A.C. 1004.

[7] See "Application of Jewish Law in Palestine," by Norman Bentwich, M.C., *Journal of Comparative Legislation*, Third Series, vol. ix, pt. 1, pp. 59, 66.

array. But the clearest and the most vigorous statement is to be found in the model prose of *Maimonides'* 12th Book, "*Kinyan.*" Among other laws this comprises the law of sale (*Hilḥoth Meḥirah*) and the law of gift (*Hilḥoth Zeḥiyah U'mattanah*). The *Ḥoshen Mishpat* of *Asheri* deals with property. The guide in Jewish legal practice, however, since the sixteenth century is the *Ḥoshen Mishpat* of *Karo.*

Fundamental Principles.—The fundamental principles of the Jewish law of property can be dealt with under the following headings: I. Divisions of Property. II. Modes of Acquisition. III. Ownership. IV. *Iura in re aliena.* V. Possession.

I. **Divisions of Property.**—In the Jewish codes the whole subject of property is dealt with under the general heading *Kinyan.* This word primarily means "an object of property," thence, "a mode in which property is acquired," and finally "rights of property." Its chief meaning is "a mode of acquisition."[1] *Kinyan* is exercised only over a tangible and ascertained thing, or over its fruits. It can confer either *dominium* or lesser proprietary rights. Of the right to use the *res* there can be no *kinyan*, but only a *kinyan* of the *res* itself for a particular purpose. The *res* must exist, and at the time of conveyance belong to the seller; that which is not his, *e.g.* a prospective legacy, he cannot pass. Again, the *res* must be in the seller's *Reshut* or control; he cannot sell an article which has been stolen from him. And finally, the goods must be both ascertained and known to both parties. A sale by X of all that is in X's house is deemed to be a gamble. It may be straw or gold, and so no property passes.[2]

Property is divided into *Karkaot* (immoveables) and *Metaltelin* (moveables). Slaves, for the purpose of biblical laws, were deemed to be land; in the rabbinic laws they came to be regarded as moveables. *Karka* included anything fixed to the soil, except those things which are no longer required for the land, *e.g.* grapes ready for the gathering.[3]

Between these two forms of property there are several important distinctions. First, the modes of acquisition differ. Next, only immoveables are charged for debt. Third, for immoveables there is a three years' period of limitation. And lastly, only to moveables does the law of *Ona'ah* apply. By this law against "overreaching," if A sold to B for 7 units or bought from Y for 5 an article worth 6, B in the first case and Y in the second could, within a reasonable time, obtain rescission.[4]

Moveables are further subdivided into *Perot* and *Kelim.* *Perot* are things consumed in the use, *e.g.* fruit; *Kelim* are things not consumed in the use. Cattle, too, are moveables, but a different mode of acquisition applies. *Shtarot* (deeds) are *metaltelin.* A deed passes by writing and delivery, and with it passes the security which it represents.

[1] Jastrow's *Dictionary of the Talmud*, p. 1392.
[2] Maimonides, *Hilḥoth Meḥirah* v. 14; xxii. 13. 1, 3, 5, 6; xxi. 2, 3.
[3] *Hilḥoth Meḥirah*, i. 17.
[4] *Hilḥoth Meḥirah* xiii. 8; *Baba Mezia* 49*b*; *Jewish Encyclopedia*, vol. ix, p. 402.

Property is also classified according to its relation to its owner:

1. *Hefker, i.e. res nullius* or property belonging to no one. This included (*a*) things in seas, rivers and deserts, (*b*) things which the owner has *declared* to be acquirable by any person.

2. Things in public highways, which all may use but none acquire.

3. Things which are the object of private ownership.

4. *Hekdesh* or *res sacræ, i.e.* things devoted to the Temple, its priests or sacrifices. Things become *hekdesh* by declaration, and cannot then be commercially dealt with.

5. *Isure Hana'ah* or *res extra commercium, i.e.* things biblically forbidden to be used, *e.g. Orlah, i.e.* fruit of trees for the first three years.

6. Things liable for debt (immoveables) and things not so liable (moveables).

In addition to this classification of property according to its mobility and its relationship, things are either (*a*) *Keren*, the principal, (*b*) *Perot*, the fructus, (*c*) *Shevaḥ*, appreciation of an article. An article appreciates either through work done upon it, or through a rise in market value.[1]

II. **Modes of Acquisition.**—It is characteristic of an ancient legal system to require objects of property to be transferred in a formal manner. The mode of transfer is not for the purposes of evidence, but is of the essence of the transfer. The object cannot be publicity. For why for different species of property are different modes prescribed? Nor does the Talmud require witnesses generally either to validate or to evidence a transfer. Nor yet does Gulak's explanation suffice, that a formal transfer irrevocably fixes the *consensus* of the parties.[2] For is not this open to the same objection? And does it not justify rather than explain? The origin seems to lie in the instinct of primitive society to express itself in all the acts of life, so to say, ceremonially. Only with the progress of society comes the transition from the formal act to the act which just expresses the will of the parties.

In the Bible there are three references to modes of acquisition. First, the purchase by Abraham of the cave of Maḥpelah (*circa* 1800 B.C.). The purchase is public, at the gate of the city, probably before a Council of Elders. The money is weighed, and by this mode (reminiscent of *per æs et libram*) the property passes.[3] Secondly, Jeremiah's purchase of his cousin's estate in *Anathot* (*circa* 600 B.C.). With the weighing of the money a deed is written and attested. It was an indenture of two parts: one part was for public use; the other, the sealed part, contained "the terms and conditions." The conveyance was executed during the Babylonian siege and both parts accordingly were placed in

[1] See *Yesode Hamishpat Ha'ibri*, by Asher Gulak (Berlin, 1923), vol. i, pp. 97–101, and vol. i generally, for a lucid presentation of the whole subject. I have followed in the main throughout this essay the classification of Gulak, and I here acknowledge my great indebtedness to this work.

[2] *Ibid.*, p. 103.

[3] *Ibid.*, p. 105; *Gen.* xxiii., whole chap., esp. vv. 7, 18, 19.

an earthen vessel.[1] Lastly, there was the redemption by Boaz of Elimelech's estate, before ten men at the city gates. Boaz hands over his shoe in notional exchange for his kinsman's land—the origin of *Kinyan Sudar*.[2]

From and after Talmudic times, immoveables were acquired in three ways, viz., by (1) *Kesef*, payment of the price. (2) *Shetar*, execution of a deed. (3) *Ḥazakah*, an act of ownership.

(1) *Kesef*, in biblical times, was a mode of acquisition for moveables also. But its scope was narrowed and, even in the case of immoveables, it is valid only in places where a deed is not customary. In places where a deed is usual, the property does not pass on payment.

(2) Only fragments of *Shetarot* survive in the Talmud, but from mediæval times we have complete precedents. The execution of a deed did not pass the property until the price was paid.[3]

(3) *Ḥazakah* is the exercise of an act of ownership by consent of the vendor and in his presence, or in his absence and by his consent, as when he says: "Take possession." Such acts are those whereby the land is used or improved, *e.g.* blocking a path, breaking or closing a fence. The delivery of a key operates as a declaration by the vendor to the vendee to take possession; to be effective it must be followed by the taking of possession.[4]

Moveables cannot be acquired either by payment of the price or by deed. In one of five main modes the property in them may pass:

(1) *Ḥazakah*, *i.e.* the exercise of certain acts of ownership. The usual act is *Hagbahah*, *i.e.* lifting up, which applies to any chattel and in any place. If the article cannot be lifted, a *Meshiḥah* or a *Mesirah* must be performed. The buyer performs *Meshiḥah* to acquire the article, *i.e.* draws it to himself, if it is in the *Reshut* or custody of the buyer or in the *reshut* of buyer and seller. If the article is in a place which belongs neither to buyer nor seller, or in a highway, *Mesirah*, *i.e. traditio*, is the necessary mode. A ship in open sea is acquired by *Mesirah*.[5]

(2) *Kinyan Ḥazer*. Any article which comes on to a person's *ḥazer* or yard is his, whether the article belonged to someone else or was declared *Hefker*. Articles thus pass to the owner of the land even without his knowledge and even though the land is in the possession of a lessee or borrower. Moreover, the four cubits in which a person stands in the highway came to be deemed to be his *ḥazer*, for the purpose of acquiring *res nullius* and lost property. Again, any moveable placed in a chattel in the owner's land belonged to him, under this mode of *Kinyan*.

[1] *Jer.* xxxii. 6, 10, 11, 14.

[2] *Ruth* iv. 7.

[3] *Baba Batra* 51*a*; *Kiddushin* 26*a*; *Gittin* 40*b*. And see Gulak's *Ozar Hashetarot* (Jerusalem, 1926). Sale, pp. 159–82; Gift, pp. 182–91; Debt, pp. 200–16.

[4] *Hilḥoth Meḥirah* i. 8 and ff.; *Ḥoshen Mishpat* § 192.

[5] *Baba Batra* 76 *a*, *b*; *Hoshen Mishpat* § 198; *Hilḥoth Meḥirah* iii, iv. 3.

(3) *Kinyan Agab Karka.* A sells to B a parcel of land together with goods. As soon as the land passes, there pass, too, the goods. The lands may be sold, the goods given, or vice versa. Nor need the goods be attached to, or situate upon the land Thus A can sell Blackacre with the goods on Whiteacre. Hence, *in effect*, goods could pass without any formal mode of transfer, as long as the land—even though a nominal parcel—were formally transferred. This mode was chiefly used to convey goods as security for debt. (For in biblical law, goods could not be charged.) In the days of the Babylonian *Geonim* or rabbi-judges (A.D. 700–1000) the transferor need possess no land at all. He passed the goods together with the four cubits of land which every Jew is deemed to own in Palestine. And later, if the vendor declared in his deed that he sold the goods together with his four cubits of land, this was deemed to be conclusive evidence of such ownership.[1]

4. *Kinyan Halifin.* This is acquisition by barter, whereby, as soon as A, by formal mode, acquires from B the article to be exchanged, B, without formal mode, automatically acquires the other article. Thus land can be exchanged for land.[2]

5. *Kinyan Sudar* developed by legal fiction from the previous mode and became so usual a method of transfer of all property that it became known as "*kinyan.*" A wishes to buy a house or a bottle of wine from B. A takes a chattel of his own, however small its value, and says to B: "Acquire this chattel in exchange for your land or your wine." This is a fictitious contract of barter. The moment B, by performing the *hagbahah*, acquires A's article, A, without any formal conveyance, acquires the house or the wine. A *sudar* or handkerchief is the article generally used. Any *keli* can be used, but not money or fructus. (Thus exchange proper is differentiated.) After the transaction B returns to A his handkerchief. By this method all property (except current coin) wherever situate can be acquired. No witnesses are necessary, but, while the contract is still executory, *i.e.* before the *sudar* is acquired by B, either party may repudiate the contract.[3]

Cessio in iure and the "common recovery" will readily occur to the mind as examples of the beneficent legal fiction not confined to European law. And, indeed, "it would be rash to suppose that the age of legal fictions is wholly past."[4]

Of the modes of acquisition it must be added that by local custom the list could be, and was, enlarged. A sale could not be perfected by mere agreement, even if there were witnesses or if the price were paid.[5] But if by local custom (*Minhag Hamedinah*) the property passed when

[1] *Ḥoshen Mishpat* § 202; *Hilḥoth Meḥirah* iii. 8.
[2] *Ḥoshen Mishpat* 203; *Hilḥoth Meḥirah* v. 1–4.
[3] *Baba Mezia* 47*a*; *Ḥoshen Mishpat* § 203; *Hilḥoth Meḥirah* v. 5, 6.
[4] Maine's *Ancient Law*, p. 31; Note of Sir F. Pollock, p. 47.
[5] *Ḥoshen Mishpat* § 189; *Hilḥoth Meḥirah* i. 1.

the buyer marked off the goods from the seller's property, the sale was thereupon complete.[1]

III. **Ownership.**—Ownership is "a plenary control over an object." In Jewish law it is acquired in three ways. First, by sale; property does not pass on contract, but only on conveyance, *i.e.* by one of the formal modes. Until then, either party may retract. But if, after contract and payment but before conveyance, either party does retract, an imprecation is pronounced upon the retractor by the Court, in the following terms: "He who punished the men of the Flood and the men of the Dispersion and the men of Sodom and Gomorrah and the Egyptians who were drowned in the sea, He will punish the man who does not stand by his word." The price must then be returned. If either party rescind the executory contract before payment has been made, no imprecation is pronounced, but the defaulter is put in the category of "untrustworthy persons."[2]

Next, by *Mattanah*, gift. With one exception a verbal gift is no gift. "There cannot be a gift without a giving and a taking. . . . They are not evidence to prove a gift, but facts to be proved that constitute the proposition that there has been a gift."[3] And, in Jewish law, a thing can be given only by the same modes in which it can be sold. The giver who breaks his word incurs no imprecation, but, in the case of a small gift, is regarded in the category of "untrustworthy persons." But a verbal gift by a dying person, even if unaccompanied by conveyance, is valid. A gift may be conditional, and on the failure of the condition may fail.[4]

Thirdly, by *occupatio* of things declared *hefker*, or of lost or stolen property which the previous owner has given up the intention of recovering. If land, such property is acquired by *Ḥazakah*; if moveables, by *Hagbahah* or *Meshiḥah*.

As well as absolute ownership, *Kinyan* may confer an ownership for particular purposes. First, there may be just *Kinyan Perot*, as where A sells to B land for its fruits, the land to remain A's land. Again, A may sell the land to B, with a *Shiyur* (reservation) of the fruits for himself. Secondly, there may be *Kinyan Lazeman*, as where X sells a house to Y for a year, or for the life of Y. For that period Y is the owner. The transaction is regarded not as a lease of land or a bailment of moveables, but as a sale for a period. Y is entitled to commit waste as though he were absolute owner. Again, if X sells his land to Y for life, and after Y's death to Z for life, Z gets merely what is left. Y can commit waste or destroy.[5]

But even absolute ownership is subject to restrictions. Nuisances

[1] *Hilḥoth Meḥirah* vii. 6.
[2] *Baba Mezia* 49*a*; *Ḥoshen Mishpat* § 204; *Hilḥoth Meḥirah* vii. 1, 2.
[3] Per Lord Esher M.R. in *Cochrane* v. *Moore*, [1890] 25 Q.B.D. 57, at p. 76.
[4] *Ḥoshen Mishpat* § 207; *Hilḥoth Zeḥijah* iii. 18, 6.
[5] *Ḥoshen Mishpat* § 212 4; *Hilḥoth Meḥirah* xxiii.

like heat and smoke and smell are wrongs, though one may acquire the right to commit them.[1]

Ownership is divested by lapse of time, *e.g.* if a *res* is sold for a limited period; by passing of the property; or by a mode called *Yiush*. This refers to property which has, *e.g.*, been stolen and which the owner has *given up the intention of* recovering. Land cannot thus be acquired. The thief cannot thus acquire the goods he has stolen, but a third party may do so from him.[2] Ownership may further be divested by *hefker*, *i.e.* a mere declaration to abandon, permanently or for a limited period. A *res* does not become *hefker* by abandonment without declaration.[3] Rules were made to prevent an owner from declaring his property *hefker* in fraud of creditors and then reacquiring it. The declaration must be made in the presence of three witnesses, and if, within three days, the declarant resumed the property, the declaration was void. Yet even if the *res* did validly become *hefker*, the *res* might be followed into the hands of a new owner and seized from him by a creditor of the previous owner. With *hefker*, *derelictio* should be contrasted, whereby "if a thing was intentionally *abandoned* by its owner without the desire of recovery . . . it could be occupied by anyone."[4]

IV. **Iura in re Aliena.**—Rights over the property of another must, in their turn too, be acquired by the appropriate *kinyan*. The main rights arise from hiring and lending. There is also the right to commit a nuisance and the creditor's rights over his debtor's land.

In Jewish law, A, by *hiring* a house from B becomes the owner for a limited time. The hirer may use the property hired and, according to agreement or local custom, eat the fruits. He cannot change the mode of user. He is not liable for depreciation through working, of the thing hired.[5]

If X *borrows* an article from Y, X similarly becomes owner for a limited period. The obligations of the borrower are naturally higher than those of the hirer.

Servitudes in Jewish law imply ownership for a limited purpose. In general a man must so use his property that he do not damage the property of his neighbour. But if the neighbour do not complain, the latter is estopped from setting up his rights subsequently, and the other party thereby acquires a right to commit the particular nuisance. Positively, too, he can acquire this right. The *prædium serviens* can only be sold subject to the servitude.[6]

Certain debts give the creditor a proprietory right over his debtor's land. This may attach, of itself, to all the debtor's land, or, by way of

[1] *Hilḥoth Sheḥenim* viii. 4.
[2] *Hilḥoth Gezelah* xiv.
[3] *Ḥoshen Mishpat* § 245; *Hilḥoth Avedah* xi. 11.
[4] Buckland, *Textbook of Roman Law*, p. 208.
[5] *Hilḥoth Meḥirah* xxiii. 8.
[6] *Hilḥoth Sheḥenim* vii.

hypotheca, to a specific part. In biblical times, land was charged with all debts. Later, only liquidated and attested debts had the privilege.[1] Again, formerly, only land owned at the date of the debt was charged and could be seized from a purchaser or heir. Moveables could not be so charged. Of course, any property actually in the debtor's possession could be seized. From Talmudic times, after-acquired property could, if so specified, be charged by the debtor and followed by the creditor. Moveables, moreover, present and after-acquired—if passed with even fictional land—became impressed with the charge. During the *Geonic* period, property inherited by the heir—moveables as well as immoveables—was liable as assets for the debts of the deceased. But the fear that any chattel of any person was liable to be seized for the debts of the previous owner caused a rule to be made prohibiting the following of moveables for debt. The Court sold followed property. A creditor was obliged to send in notice of his claim or he found his rights against the land barred.

The effect of this land charge resembles that of a floating charge on the assets of a company. The owner remains free to dispose of his land. But unlike a floating charge, land thus disposed of passes impressed with the charge and can be followed. The creditor cannot sell the land, for it is not his. But he may sell the debt and his security, either by selling the debt itself or by assigning the deed.

"First in time, first in right," is the rule where one piece of land is secured for several debts. But first, uncharged property is taken. Should none remain, the creditor must go to the Court, which makes an order allowing him to follow and to seize property last bought. This is then proclaimed for thirty days and sold by the Court.[2]

Other remedies over property given to the creditor are *Mashkon*, pledge, and *Apoteke*, hypotheca. A pledge was sold by the Court. An analogous remedy over land was called *Mashcanta*: the creditor entered, took possession, and deducted from the debt the rents and profits.[3] The pledgee, not being the owner, cannot sell, though he may assign the pledge. In *Apoteke* neither property nor possession passed or was transferred. This remedy applied not to moveables but to land only. The transaction had to be witnessed, but it need not be by deed.

V. **Possession.**—In Jewish law possession is neither the origin of ownership, nor is it, *per se*, a *prima facie* title. "The protection of possession," said Ihering, "as the actuality of ownership is a necessary complement of the protection of ownership, a facilitation of proof granted to the owner which necessarily serves the non-owner also." "It is designed not for the protection of the thief but of the owner, and as a rule it is the owner who benefits.[4] Possession, that is, does not *give* title; it raises a rebuttable presumption of title. The Jewish possessor is protected under the law of prescription and limitation, not *qua* pos-

[1] *Gittin*, 51.
[2] *Baba Batra* 169*a*.
[3] *Baba Mezia* 67*b*; 62*a*.
[4] Cited by Lightwood, *L.Q.R.*, iii, pp. 43, 44.

sessor, but *qua* real or apparent owner. This is no mere verbal distinction. For, while possession was protected by interdicts and (in English law) property grew out of possession, the reverse is the truth in Jewish law. *Reshut* is the nearest Hebrew equivalent to possession, and that, in the sense of "actuality of ownership." *Hazakah* (as Gulak points out) is not analogous.[1] For, in this sense, this word means uninterrupted acts of ownership, in the case of land, for three years. But this raises merely a presumption of ownership.

Possession then, in Jewish law, is ownership made visible. If the possessor can prove title by deed, he is the owner. If he cannot prove title, but has complied with the rules of prescription or limitation, and there is no other to prove title, he is the apparent owner. But, in such a case, it is the protection not of possession but of ownership.

Hence the problems which have so sorely baffled jurists as to the nature of possession in Roman law are not, in Jewish law, urgent. Nor does the theory of Mr. Justice Holmes, stated of English law, seem here to apply:

> It is quite enough for the law that man, by an instinct which he shares with the domestic dog . . . will not allow himself to be dispossessed either by force or fraud of what he holds without trying to get it back again. . . . As long as the instinct remains, it is more comfortable for the law to satisfy it in an orderly manner than to leave the parties to themselves.[2]

A thing enters the *reshut* of any person by his exercising over it one of the acts of ownership spoken of as *Ḥazakah*.[3] A thief in Jewish law has merely *detentio* unprotected by the Court and unripened by prescription.[4] A bailee has a mere *detentio*; possession is with the bailor. A slave too has no possession but only custody.

> A servant is denied possession [writes Mr. Justice Holmes, of English law] not from any peculiarity of intent with regard to the things in his custody, either towards his master or other people, by which he is distinguished from a depository, but simply as one of the incidents of his status. . . . The status of a servant maintains many marks of the time when he was a slave. The liability of the master for his torts is one instance. The present is another. A slave's possession was his owner's possession on the practical ground of the owner's power over him, and from the fact that the slave had no standing before the law. . . .[5]

The term applied to prescription and limitation is *Ḥazakah*. Different rules apply to moveables and to immoveables. Whoever exercises acts of ownership over moveables and has them in his *reshut* can claim ownership. There is no prescriptive period. The presumption of ownership may be rebutted by evidence that the article was merely borrowed or sent to be worked upon. The possessor is helped by an interesting

[1] *Yesode Hamishpat Ha'ibri*, vol. i, § 67.
[2] *Lectures on the Common Law*, vi, p. 213.
[3] *Hilḥoth Genebah* ii. 16; *Baba Kama* 79.
[4] *Baba Mezia* 16; Gulak, i. p. 171.
[5] *Common Law*, pp. 227, 228.

rule of Jewish evidence called *Migo*. This is "a legal rule according to which a deponent's [*i.e.* a witness's] statement is accepted as true on the ground that, if he had intended to tell a lie, he might have invented one more advantageous to his case." [1] The witness's declaration against interest is *prima facie* evidence of his story. But the goods must have been enjoyed *beshufi*, *i.e.* without protest from the previous owner. They must have been in the control of the possessor, who must have evinced an intention to act as owner. But as soon as the plaintiff contests the possessor's right by a process called *Ir'ur*, the onus of proof shifts on to the possessor. He cannot acquire prescriptive right except by positively proving his *Ta'anah* or claim. He must then prove either that the plaintiff sold or gave him the article or that it was taken in discharge of a debt.[2]

Land is always in the *Ḥazakah* of the owner.[3] The possessor must prove that he has, according to the custom of an owner, "eaten the fruits" for three consecutive years.[4] Unconsecutive years do not count, unless the land would normally have been left unused for the interrupted period. The three years period must have begun and continued without protest. The protest must be made by deed, attested by two witnesses, but not necessarily in the presence of the possessor. If the owner within the three years pays the taxes on the land or sells it, he has exercised acts of ownership, which operate as a protest. But in the action it is open to the plaintiff to prove that the land is or was his. The *onus* is then on the possessor to prove title. If the latter says: The land is pledged to me, his word is accepted on the principle of *Migo* (for he might have said: the land is sold to me). If he says: I have a *Shetar*, he must produce it. If he allege that X (a third party) sold it to him, he must prove that X lawfully acquired it from the plaintiff. The three years' rule does not enure in favour of a guardian who remains in possession of his ward's land, nor in favour of a son in respect of his father's property, nor in favour of a wife in respect of her husband's property. No protest is required, for no presumption is raised.

In certain exceptional cases the Court did protect the possessor as such. But these are anomalous and are to be historically explained. Where a deed is ambiguous, it is to be construed against the party executing it. If, however, he put on the deed the construction most favourable to himself, and take possession of property thereunder, the Court will not interfere. Similarly, where a question of law is left open in the codes: *potior est conditio defendentis*.[5] But these and similar cases are to be explained on the principle that the Jewish Courts, being

[1] Jastrow, p. 216.
[2] *Hilḥoth Toen Venit'an* viii.; *Baba Batra* 41*a*.
[3] *Hilḥoth Toen Venit'an* xi.–xvi.
[4] *Baba Batra* iii. 1, 2 (28*a*, 38*a*, 39).
[5] *Baba Kama* 15*a*; *Ketuboth*, 21*a*, 41*a*; Gulak iv, p. 128.

always subject to the law of the country where they functioned, had not the complete power of enforcing their judgments.

How does *Ḥazakah* compare with *usucapio* and *longi temporis præscriptio?* Of *Usucapio* Buckland says: "The acquisition rested on mere lapse of time, not on the fiction which appears in some systems under which time is evidence of a last grant." And again: "*Usucapio* was a mode of acquisition: it was not merely a bar, but made the usucaptor owner. It was positive or acquisitive. *Præscriptio* was in principle merely negative or extinctive. It gave the holder a defence if sued for the *res*, but did not make him owner. . . . [But] it became acquisitive."[1] *Ḥazakah*, on the other hand, is not a mode of *Kinyan*, not "a positive mode of acquisition." Indeed (as Gulak points out), it is treated in the Jewish codes not under the law of property (*Kinyan*), but under the law of procedure.[2] It is merely a rebuttable presumption. Long ownership does not *give* title: it is merely the best evidence of title.

In the course of this account of the fundamental principles of the Jewish law of property, it must have been apparent at how many points Jewish law and Roman law present a resemblance, which, on investigation, turns out to be superficial. It was under a Roman government in Palestine that, in the course of several centuries, the *Mishnah* grew up into a dynamic code. The Roman civil service must, in their disputes, have used Roman law. With the Roman system the Rabbis—men of catholic culture—must daily have been brought into contact. And of Roman influence even in technical terms, *e.g. Apoteke*, the Jewish law of property bears many traces. But a rule of Roman law was not incorporated, but adapted to Jewish conditions and conceptions. "The history of law is the formal expression of the development of society."[3] Jewish law, adopting (as it progressed) non-Jewish legal ideas, did but adapt them. Autocthonous, fundamentally, it was and it remained. In the Mosaic code of the fifteenth century B.C. its rigorous roots still live. The *Mishnah* of the third century A.D. is the broad-based trunk. Thence, for three hundred years, the broadening boughs of the *Talmud* stretched. For a millennium, then, ever and anon, were to spring the quickening branches of rabbinic codes. And to-day in Palestine, under the constitution, a limited jurisdiction is given to rabbinical Courts. Like the common law of England, this tree of the Jewish law has never ceased from bearing. But what new branch will grow, as yet no one can say.

[1] *Textbook of Roman Law*, pp. 242, 249.
[2] *Hilḥoth Toen Venit'an*; Gulak i. p. 169; iv. p. 114.
[3] *Common Law*, p. 213.

THE GERMAN REVALORIZATION ACT, 1925.

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The Revalorization Law as codified in the statute of July 16, 1925, relating to the revalorization of mortgages and other claims, represents the most important part of the body of laws governing revalorization. It affects almost all obligations within the domain of civil law.

In the year 1924, an attempt was made by Statute embodied in the third emergency-decree on taxation to settle finally the question of revalorization, but the campaign started by the associations for the protection of the interests of revalorization-creditors and the pledges given by political parties during two election campaigns led to a resumption of the fight. At the end of 1924 a decree was issued for the provisional settlement of revalorization which declared that all prior enactments should be considered as only provisional. On February 17, 1925, a law was passed in which it was provided that in litigation concerning the revalorization of investments within the meaning of the above emergency decree on taxation every party should be allowed to demand provisional suspension. This law was to be in force until April 30, but it was extended twice (on March 27 and June 28) until July 15, 1925. On July 16 the new revalorization law was passed with retrospective effect as from July 15, 1925.

This law governs the revalorization of such claims as were hit by the inflation, and were based on obligations accrued before February 14, 1924 (see 3rd emergency-decree on taxation), and it deals also with the payments of sums of money expressed in German currency no longer in existence, more particularly "marks," *i.e.* paper marks.

In computing the revalorized value, the law takes as its starting-point a certain definite gold-mark value, which the respective claim had at the particular point of time which is made decisive for such computation. There are precise provisions as to the point of time which is to be decisive for the ascertaining of this gold-mark value. There are different rules for the revalorization of claims according to the category to which they belong.

The ruling principle is that the revalorization of investments of capital should be 25 per cent. of the old gold-mark value.

This is specially so in regard to the revalorization of rights *in rem* and particularly mortgages. The larger part of the law consists of provisions concerning these. The law distinguishes in principle between revalorization of the personal debt and of the right *in rem*. It maintains

the principle established by the civil law as to the dependence of the latter rights on the former ; the revalorization of a right *in rem* can never exceed the value of the claim secured by it, *i.e.* at the most 25 per cent. of the gold-mark value.

It is of great importance whether the obligation protected by the right *in rem*, as, *e.g.*, mortgage, has already been performed or not. In the latter case the question whether, on principle, revalorization has to take place does not arise, but only the question to what extent it has to take effect. There are two possible cases in which the revalorization may be at a percentage different from 25 per cent. In the first case, the owner of the property charged has a right to demand that the revalorization should be reduced to a percentage not lower than 15 per cent. where it would create a hardship on his side.

An application to this effect must, however, have been made before April 1, 1926. In the second place it is conceivable that the personal debt should be revalorized at a rate other than 25 per cent. In certain specific cases the revalorization may be lower or higher than 25 per cent. This is so where, for instance, the claim arises out of a partnership or other participation, or where it arises from the obligation to maintain a person ; or again where the debt for which the mortgage was granted consists of the unpaid balance of a purchase price. This is in practice the most important case. The same rule applies also to the case of mortgages expressed to be by way of security with the important exception of mortgages to secure a loan.

Applications of such a nature must also have been made before April 1, 1926. Where the revalorization is fixed lower than 25 per cent. this affects the right *in rem* also. If a higher percentage be granted than 25 per cent., then the amount of the personal debt exceeding 25 per cent. is no longer secured by the right *in rem*. It is clear that in all cases claims arising out of the right *in rem* and out of the personal debt may be directed against different persons. If revalorization is reduced upon grounds which the personal debtor can plead, this operates also automatically in favour of the owner of the property charged. The position is different when the obligation secured by the mortgage has already been performed. The law means here by performance, performance in the old currency. It follows the reasoning adopted by the Courts, that the performance in such case does not by any means constitute the full discharge of the liability. Therefore even in such cases revalorization is allowed, and that although the mortgage has as a consequence of the nominal performance been already cancelled in the mortgage register. The only cases in which the rights *in rem* remain finally extinguished are : (1) When there has been in the meantime some transaction entered into on the faith of the position shown by the register ; or (2) where the right *in rem* has been extinguished by a sale under order of the Court. The revalorization of the personal debt is in these cases an independent matter.

Revalorization after nominal performance in respect of the debt and the right *in rem* depends on application having been made before January 1, 1926. Revalorization can then be granted in two instances: first, where the creditor in accepting the performance has reserved his rights in regard to the debt or debts as distinct from the right *in rem*, and secondly, where performance took place between June 15, 1922, and February 14, 1924. In the latter case the law has retrospective effect without any express reservation having been made. The personal debtor and the owner of the property charged may, however, object to the claim of the creditor each separately on the ground that revalorization would constitute for each of them respectively an inequitable hardship for specified reasons laid down by the law (financial situation, losses of fortune, small purchase price when the property was sold, or that the owner was compelled to sell the property far below its value in consequence of notice given by the creditor for the repayment of the debt). The objection, which may, and in certain cases must, deny on principle that there is a right of revalorization, must be lodged within three months after receipt of the notice that a revalorization claim has been filed with the Court. If the Court affirms the order for revalorization of the right *in rem*, an entry to this effect is made in the real property register.

There are precise provisions, regarding the priority of the revalorized rights in the real property register. It is of importance to note that intermediate priorities have been created by operation of the Act, of which the holder of the property may avail himself. This is based on the principle of the German law that a mortgagee is not entitled to gain priority by the extinction of a prior charge, but that the prior mortgage, having been satisfied by the owner of the property, sinks to the level of an owner charge, *i.e.*, a charge on land purely and simply without a personal debt. This owner charge is for the benefit of the owner of the property.

Thus, the reservation of priorities always arises after re-registration of the first revalorized charge, and within the limits prescribed for "authorized investments," also after re-registration of subsequent charges. Subsequent chargers cannot object to such intermediate priorities conferred on the owner of the property. Where, however, charges are registered expressed in "Reichsmarks," "fine gold," "rye," or in any other measure of stable value, or in a foreign currency, the creditors can, in these cases, claim the priorities otherwise reserved to the owner of the property, and can demand registration accordingly.

There are provisions as to revalorization after assignment of the debt. In this case the old creditor may demand revalorization for himself, provided the conditions for revalorization apply to his case, *i.e.*, if there has been a reservation in the contract or the law has a retrospective effect. There are also provisions concerning the value of sums paid on account and as to protection against interim registrations.

Where revalorization has been made, payment of the capital may not

be demanded before January 1, 1932. It is, however, frequently overlooked that this does not affect provisions in Statutes or in contracts, by which the repayment of capital may be demanded before the due date in certain specified cases, especially in the case of overdue payments of interest. The debtors, *i.e.*, the owner of the property and the personal debtor, may at any time give three months' notice for repayment of the capital before maturity. A further facility for the repayment of capital has been made possible, namely, repayment by instalments up to January 1, 1938. In that case the first instalment may be fixed for January 1, 1930, but only when an application to this effect has been made prior to January 1, 1927. On the other hand, where the financial situation of the creditor makes it urgent and no serious hardship is caused to the debtors thereby, the Court may order that repayment shall take place, wholly or partially on January 1, 1926, or at a subsequent date ; in this case, however, not more than 10 per cent. of the revalorized amount, and as a maximum 1,000 Reichsmarks, in one year can be demanded. The application to this effect must have been lodged before April 1, 1926.

Interest on the revalued amount runs from January 1, 1925. By the decision of the Courts it runs from the date of registration, when the revalorization is in virtue of the express reservation of rights, or of the retroactive effect of the law. The rate of interest rises from 1 to 2 per cent. : it reached 3 per cent. at January 1, 1926, and will reach 5 per cent. at January 1, 1928.

Special revalorization Courts have been established to deal with revalorization, and to these all applications have to be presented. They have power to decide the extent of revalorization. Upon the question whether or not a right to revalorization exists, they decide only when both parties subject themselves voluntarily to their jurisdiction. Otherwise, the question must be decided by the ordinary Courts or other competent authorities. An appeal from the decision of the revalorization Court lies directly to the *Landgericht*, from which there is a right to appeal on questions of law to the *Oberlandesgericht*. If the decision of the revalorization Court is not challenged, it becomes binding on the Courts and administrative authorities. Such decisions and compromises entered into before the revalorization Courts are a good title upon which execution may follow.

The rules as to mortgages apply also to other rights *in rem* over land, and to mortgages over registered ships and railways with their plant, rolling stock, etc., and to the debts secured thereby. The law furthermore regulates the revalorization of industrial debentures and similar bonds. They are revalorized at 15 per cent., but the debtor may demand a reduction of this rate before April 1, 1926. In spite of the performance having been made, there is in this case also a revalorization when the right to it has been expressly reserved, and the same applies also to bonds which have been drawn for repayment, and to bonds of which

notice of repayment has been issued, and although satisfied nominally in the course of settled accounts, provided the bonds are still in the actual or constructive possession of the creditor, or are still in the hands of the bank to which they were presented for redemption. A peculiar feature of the law is the creation of a special right for the so-called " old holders." These are creditors who acquired the bonds before July 1, 1920, and remained holders of them down to the moment when the application for revalorization was made. By making their application within the period allowed they acquire, as from July 1, 1920, apart from the revalorization itself, the so-called *Genussrecht* by which they participate in the net profits and the results of the liquidation. The nominal value of such participating right (*Genussrecht*) is equal to 10 per cent. of the gold-mark value at the time of purchase. Special provisions are laid down for ascertaining the date of the acquisition. It is a condition precedent that the claim be lodged with the debtor within one month after notice to close was given by the debtor. Precise provisions are made as to the distribution of the net profits. The amount not allotted to the holder of the *Genussrecht* has to be applied towards payment of interest up to and not exceeding 5 per cent. per annum and the balance towards redemption of capital. The *Genussrechte* may be made payable to bearer or to order. It is lawful for the debtor to give the creditor instead of *Genussrecht* an additional revalorization or payment in cash ; he may also redeem them by payment of their nominal amount.

For the revalorization of mortgage bonds (*Pfandbriefe*), annuity bonds and common bonds a distribution fund is to be formed, which consists of the securities in existence on February 13, 1924, of the securities in existence before, if their revalorization exceeds 15 per cent. or takes place by reason of the retroactive effect of the law and of a contribution from the other assets of the debtor. Revalorization under this head is also subject to reservation of rights, drawing of bonds and notice of repayment. The precise regulations in this respect are to be given by the Reichs Government. In the case of bonds to bearer or transferable by endorsement which have been issued by Public Corporations carrying on trade, there is a revalorization at 15 per cent. The debtor may apply for reduction of the revaluation. Revalorization will be granted in spite of reservation of rights or the drawing of bonds having been effected and of notice of repayment having been given.

A similar fund for distribution is created out of the revalorized assets of savings banks together with an additional contribution, for the revalorization of savings deposits with public savings banks or savings banks under Government control. Such funds will be administered by a trustee who prepares a scheme for its distribution. On principle, the creditors are to be satisfied in proportion to the gold-mark value of their claims. The carrying out of the scheme is left to the State Government.

A similar procedure is followed for the revalorization of claims arising

out of life insurance, invalid or accident insurance as well as employers' liability insurance. In these cases also a special fund is created which is administered by a trustee under a scheme for distribution. The rules as to reservation of rights and retroactive effect of the law apply here also. The details are left to the Reichs Government.

All these various cases required specific detailed regulations, and in consequence they can only be mentioned here in a summary manner. Of particular interest, however, is the special provision that in all cases of investments of capital, except where provided otherwise, the revalorization may not exceed 25 per cent. of the gold-mark value. What is meant by the term "investment," the law does not say. On the other hand, it enumerates a series of cases which are not investments. Among these are, particularly, claims arising out of partnership contracts and other participation contracts, claims for maintenance, claims arising out of contracts for compensation and dissolution as well as similar agreements or proceedings. In these cases the general principles of revalorization apply, not affected by this statute. Further claims arising out of bilateral contracts are not deemed to be "investments" within the meaning of the Act.

Finally, the law provides that claims arising out of settled accounts or other current accounts are not to be revalorized, nor is there revalorization in the case of bank deposits or, more generally, in the case of claims for the repayment of a loan or return of fungibles bailed, provided the debtor had acquired the ownership and his business is the taking in and lending of money.

I have now stated the essential principles of revalorization as far as they are laid down in the law, but the law itself constitutes only the foundation.

Countless questions regarding its construction and application immediately arose. The way in which they have been dealt with must be left to a later report.

Almost at the end of the year under review, *i.e.* on November 29, 1925, the first decree was issued containing the details for the carrying into effect of the revalorization law. It covers 135 sections, and in it the dispositions regarding the revalorization of mortgages over real property occupy the smaller space. On the other hand, the law governing the other matters is further elaborated by new principles of substitutive law. It is not possible here to enter into the details.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Amendment of the Canadian Constitution.—It was the natural outcome of the declaration of Canadian autonomy at the Imperial Conference of 1926 that a serious effort should be made to remove the difficulty which in theory affects that status by securing power for the Dominion to amend her own Constitution without necessitating interference by the Imperial Parliament. The case for serious consideration of the mechanism of change was given strength by the action of the Senate during the period of Liberal administration in insisting on its rights in a rather startling manner, and especially in its claim, successfully asserted, of the right to force amendments in financial measures. These issues, therefore, figured first among the many problems, constitutional, financial and social, submitted by Mr. Mackenzie King to the Conference of representatives of the Dominion and the Provinces which met at Ottawa on November 3. It was probably realized that nothing very definite could be expected on these vital questions from the Conference, and in point of fact the result was largely negative. There was agreement that it was not desirable to abolish the Senate or to render it elective instead of nominee, and the general trend of opinion was in favour of the proposals of Mr. Mackenzie King in 1925, when he urged that the Senate should be placed in the same position with regard to the House of Commons as that held under the Parliament Act, 1911, by the House of Lords in the United Kingdom. But any change depends on the decision as to the mode of constitutional alteration, and on that issue there was clearly a deadlock. Mr. Lapointe was prepared to recognize in the fullest manner the necessity of the assent of the Provinces to changes and to safeguard fully the position of minorities ; but arguments based on the necessity of rendering the Constitution more flexible, and on the propriety of following up the declaration of equal status in the Empire by becoming independent of Imperial action when any change was required, failed to shake the representatives of the four original Provinces. It was argued that, when there was agreement in Canada, there was no difficulty in securing an Imperial Act ; that, if power to amend were obtained, there would be a tendency to bring forward needless suggestions of change ; that party and local strife would be engendered by submitting projects of alteration to the provincial legislatures ; and that the proposed safeguards for minorities might not prove so efficacious as those already existing. It must be added that the result of the general election in

returning the Liberal Government to power has already been frankly recognized by the Senate, which in the session of 1927 passed by an overwhelming majority the Old Age Pensions Bill which it rejected on second reading in 1926, and refrained from pressing the amendments to the Rural Credits Bill which it had inserted in that year; of these one increased the burden on borrowers by fixing the rate of interest at the rate paid by the Farm Loan Board plus the cost of operating the scheme, whereas the Commons had limited the additional amount to 1 per cent. The other issues on which increased authority is at present desirable for the Dominion are such as can be disposed of by co-operation between the Dominion and the provincial legislatures; the revised Dominion legislation as to industrial disputes [1] has received support in the majority of the provinces, and the Conference showed unanimity in the desire to secure co-operation in the direction of attaining uniformity in company legislation and in safeguarding the interests of investors against unsatisfactory modes of company promotion. Co-operation is also required in the matter of the regulation of flying operations, and in the representation of the Dominion at international labour conferences. Under present conditions Canada is undoubtedly unfortunately situated, but an effective remedy can hardly be hoped for.

Canada and the Privy Council.—With the negative result of the Conference on the issue of constitutional change accords the clear reluctance of the Provinces to consider the possibility of the abolition of the appeal to the Privy Council. Though Quebec was somewhat disturbed at the decision of the Labrador boundary case, it is certain from the utterances of her Premier that the appeal remains essential as a mode of securing her special position in the Dominions, and Sir James Aikins,[2] in his Presidential Address to the Canadian Bar Association at Toronto in August, voiced a very prevalent belief when, after sketching the trend of the decisions of the Supreme Court of the United States, he suggested that, if the final decision on Canadian constitutional questions was to be made by the Supreme Court of Canada, the result might well be "the constant augmentation of the power of the Dominion and the diminishing of that of the Provinces, an encroachment upon their rights." It is interesting to note that his argument dealt only with the interpretation of constitutional issues, and that he made no claim on behalf of the present practice of cases with no constitutional issue being carried to the Privy Council. Mr. Raney,[3] formerly Attorney-General of Ontario, and now a Judge of the Supreme Court, whose tenure of ministerial office was marked by his proposal to cut off appeals from that Province to the Privy Council, has stressed another aspect of the question which has often been discussed.[4] He suggests that the Judicial Committee or

[1] See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. i, pp. 61–8.
[2] 5 Can. Bar. Rev. 562.
[3] 5 Can. Bar. Rev. 610.
[4] Keith, *Imperial Unity and the Dominions*, pp. 165, 166.

some other imperial tribunal should be made a "permanent Britannic Court of Arbitration for the settlement of constitutional questions and disputes between members of the British Confederacy, or members of the different federations composing it." One doubt suggests itself: Australia is probably too wedded to the final authority in inter-State disputes of her High Court to be willing to contemplate any change. But the main principle appears certainly sound, though its acceptance may yet be far distant.

The French Language in Canada.—A suggestion of the delicate questions which induce Quebec to insist on the maintenance of the rigidity of the Dominion Constitution and the appeal to the Privy Council is conveyed by the stress laid by many Liberals in Quebec on the danger of increasing the power of change of constitution lest it result in the weakening of the position of the French language in the Federal Parliament. Moreover, as is natural, having regard to the precedents of the equality of Dutch in the Union of South Africa and of Irish in the Irish Free State, a distinct movement has set in in the Dominion to secure similar treatment for French in all Dominion services. Thus it has been proposed to amend the Civil Service Act in order to provide that preference should be given in making new appointments to those qualified both in English and in French, that persons so qualified should receive larger salaries, and the possession of such knowledge should be a factor in all matters of reclassification. Mr. Bourassa characteristically urged that Canada ought to be made bilingual in order to preserve her from becoming a weak replica of the American Republic. The proposal naturally evoked resentment from Ontario, on the score that, if carried into effect, English would virtually be placed in a position of inferiority, whereas it ought rather to be regarded as the distinguishing mark of the Canadian people as a unit. A more cogent argument, and one which doubtless weighed heavily with the House of Commons, was the consideration that the Civil Service might well suffer severe loss in efficiency if knowledge of French were made a requisite for all entrants; it is sufficiently difficult, in view of the low remuneration still prevailing in the Service and the possibility of obtaining better-paid work outside, to secure men of ability for governmental work, and there is no necessary connexion between competence to acquire a foreign language and scientific, economic or professional capacity. Feeling in Ontario, of course, is especially sensitive, as the effort made during the war period by French-Canadian enthusiasts to insist that the French language must be taught in the public schools of the Province [1] has not been forgotten.

The Legislative Council of Nova Scotia.—An interesting judgment by the Privy Council in *Attorney-General for Nova Scotia* v. *Legislative Council of Nova Scotia* [2] has definitely settled the long-discussed problem of the power of the Lieutenant-Governor in Council to affect the constitution of the Legislative Council of that Province. The problem arose

[1] Keith, *War Government in the Dominions*, pp. 389 ff. [2] 44 T.L.R. 1.

because the local legislature has never dealt comprehensively with the matter, which it had full power to do under s. 92 (1) of the British North America Act. It merely contented itself, when federation became operative, with enacting in 1872, as consolidated in c. 2 of the Revised Statutes of 1923, that appointments should be made to the Council in the name of the Crown by instrument under the Great Seal of the Province by the "Governor-in-Council," *i.e.* the Lieutenant-Governor in Executive Council, nothing being provided as to the character of tenure or the mode (if any) of removal. Now, prior to federation, the constitution of the Council was governed by the terms of the Royal Commissions to the Governors, under which the total number was not to be raised beyond twenty-one by any appointments made by the Governor, but the total number which might be established by appointments specially made by the Crown was not limited. Tenure of office was clearly during pleasure, though it was contemplated that as a matter of constitutional usage members should hold office for life, subject to being removed on the occurrence of certain contingencies (*e.g.* bankruptcy) clearly unfitting them for office. The question, therefore, was what was the effect of the British North America Act which by s. 88 provided that the constitution of the legislature of Nova Scotia should remain as it existed at the union until altered in the manner provided for in the Act. Did this enactment leave the maximum number twenty-one ? This appeared to be a reasonable interpretation,[1] for the power of the Crown to appoint was not expressly conferred by the Act or otherwise on the Lieutenant-Governor, and this view has often been expressed in Canada. The Privy Council, however, has negatived this contention on the ground that the provision made in 1872 empowering the Lieutenant-Governor in Council to appoint new members is not severable from the right to increase the membership. In other words, the enactment of 1872 is treated as implicitly repealing any limitation of numbers which may have existed between 1867, when the British North America Act became effective, and 1872, and, though this interpretation of the enactment runs counter to the interpretation put upon it in Canada, it is clear that it is compatible with the actual terms of the law. As Professor Smith has recently reminded us,[2] interpretation of the British North America Act has revealed much in it that the Fathers of Federation little dreamed of. The other point at issue was whether the members of the Council could be deemed to hold during good behaviour ; for this there was never any legal basis, and the Privy Council had no difficulty in ruling that the legal tenure of Councillors was during pleasure. Their Lordships also naturally ruled that the right to remove rested with the Lieutenant-Governor in Council, thus leaving it open for that officer on the advice of his Council to override the resistance of the present Legislative Council to the proposals of the Conservative majority in the lower house either by swamping the Council

[1] See Keith, *Responsible Government in the Dominions*, ii, 491 ff.

[2] *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, pp. 160 ff.

or by removing the existing members who adhere to the Liberal faith and replacing them by members pledged to carry out the Conservative policy of abolishing the Council. Their Lordships, however, were not asked, and could not properly have dealt with, the question of the constitutional propriety of the use of the power in question, and from this point of view the whole matter seems to present itself in a completely different light. If since federation it has been assumed that the maximum number is twenty-one and that members hold for life, during good behaviour, it can hardly be deemed other than unconstitutional to make use of an unexpected legal power to swamp and destroy the Council without obtaining a direct mandate from the people. When the electorate voted at the last general election, they were not aware that it would be possible for the executive Government to destroy their upper chamber at pleasure, and it is only fair that their approval should be obtained either by referendum or at a general election to sanction the step. The Federal Government has, of course, the power either to forbid action by the Lieutenant-Governor or to disallow any act to abolish the Council. But it has always been the aim of that Government not to intervene in constitutional changes in the Provinces, which are expressly empowered by the Constitution freely to amend their form of government save as regards the office of Lieutenant-Governor, who serves as the connecting-link with the federation.

The Meaning of Direct Taxation.—A curious issue was presented to the Privy Council in *Halifax Corporation* v. *Fairbanks' Estate*.[1] The charter of the city of Halifax, granted by provincial Act, provides by s. 394 that property rented to the Crown or any person, corporation or association, exempt from taxation, shall be deemed to be in the occupation of its owner for business purposes, and he shall be assessed to business tax. The respondent estate granted to the Crown, represented by the Dominion Minister of Railways and Canals, a lease of certain premises in Halifax for use as a ticket office for the Canadian National Railways, stipulating that the lessee should pay the business tax, if any. The estate was assessed to business tax, but disputed its liability, and eventually obtained a majority decision of the Supreme Court of Canada holding that the tax was indirect, and, therefore, was not within the power of the provincial legislature to impose, its authority being restricted by s. 92 (2) of the British North America Act to direct taxation only. The view of the majority was effectively put by Newcombe J., who accepted the definition of J. S. Mill[2] in accordance with the practice of the Privy Council in dealing with these issues. He held that an Act which imposed a tax on a landlord of premises must be deemed indirect, seeing that it was natural that the landlord would simply pass it on to the tenant, as had in point of fact been done in the case at issue. Duff J., on the other hand,

[1] 44 T.L.R. 5.

[2] *Principles of Political Economy* (9th ed.), ii. 415; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, 581–3.

based his dissenting judgment on views such as those of the American economist, Professor E. R. A. Seligman, that as a general principle the incidence of rates in an urban district depends on a large number of factors depending on the demand for business premises and the general state of trade. Their Lordships decided in favour of the view that the tax in question was direct, insisting that the matter had to be determined as one of principle and not by reason of the special facts of any case, just as a customs duty must be deemed indirect, although it might in any special case be levied on the actual consumer, if he were also the importer, and not passed on. On this basis they held that a property tax was normally and regularly regarded as a direct tax, J. S. Mill, following Adam Smith, Ricardo and James Mill, having definitely asserted that a tax on landlord's rents fell wholly on the landlord and could not be transferred to anyone else. They distinguished the much-discussed decision in *Cotton* v. *The King* [1] by holding that it turned on its own facts, and relied instead on the case of *City of Montreal* v. *Attorney-General for Canada*,[2] where it was held that under provincial legislation the city of Montreal might legitimately tax a tenant of land belonging to the Crown in the right of the Dominion under a section of the city charter which provided for the taxation, as if they were owners, of persons occupying land belonging to the Federal Government. The net result of the case, therefore, appears to be that it is unwise to seek to strive to classify taxes by mere examination of Mill's definition, but that regard must also be had to the mode in which he and other economists of the period when the British North America Act was prepared regarded taxes then actually levied. The use of the definition lies mainly in its possible application to taxes of a novel character, regarding which usage, therefore, affords no guidance. It is worth noting that the Privy Council had no hesitation in disposing of two other points adduced against the validity of the tax. It was argued that in effect the tax was imposed on the Crown in respect of Dominion property contrary to s. 125 of the British North America Act, or alternatively that the premises, not being employed for ordinary business purposes but for a governmental activity, could not be rated as business premises. Neither contention, it may be conceded, could very seriously be maintained.

The Prerogative of the Crown in Canada.—In the Nova Scotia Legislative Council case the Privy Council evaded any pronouncement [3] whether under the British North America Act it could have been held that on federation the power of the Crown to appoint an unlimited number of councillors passed to the Lieutenant-Governor without express delegation as part of the executive prerogative. There is, of course, no doubt of the general principle that the Crown in a province is normally represented by the Lieutenant-Governor, and that the provincial government can claim all the prerogatives of the Crown so far as they relate to matters of provincial concern, and so far, of course, as they have not been regulated

[1] [1914] A.C. 176. [2] [1923] A.C. 136. [3] 44 T.L.R. at p. 3.

by legislation which is in force in the province. The rule has recently been applied by the Court of Appeal in Ontario in the case *Re Rex* v. *Rutherford*[1] to the question of the relation of the Crown as appellant to the statutory provision respecting the limit of time for entering an appeal. It was there ruled that the respondent's objection to an appeal being heard on the ground that the appeal was out of time was not valid, because, the appellant being the Crown, the statutory limitation was inapplicable. The decision has been the subject of an interesting criticism.[2] It is admitted that statutes of limitation do not bind the Crown, but the statutory restriction of time for appeal is distinguished on the score that, while a statute of limitation cuts down an existing common law right and, therefore, if it does not mention the Crown, leaves it free to rest on that right, no common law right of appeal exists, and a statute creating it confers a favour on the would-be appellant which must be taken advantage of in the exact terms of the statutory provision. Otherwise, it is argued, an absurd result would be reached, for the principle adopted would justify the Crown claiming, under an Act providing that any persons should have the right to obtain electric power from municipalities on payment, the right to receive a supply without payment. It is also pointed out that in *The Koksilah Quarry Co. Limited Liability* v. *The Queen*,[3] the Crown, having allowed the time for an appeal to go by, was refused an extension of time, though the provisions governing time made no reference to the Crown. The reasoning appears rather specious than sound, apart from authority, and the weight of the decision of the Court of Appeal of Ontario is clearly greater than that of the Court in the Koksilah Quarry Company's case.

Constitutional Change in the Commonwealth.—The failure of the referenda in 1926 to alter the Constitution of the Commonwealth has necessitated recourse to more deliberate and, it may be added, more hopeful modes of procedure. It is perfectly clear that the Constitution offers considerable room for improvement, but any change must come from reasoned agreement rather than from spectacular appeals to public feeling, and the way for it must be paved by careful investigation. The wise decision, therefore, has been taken to entrust the duty of preliminary inquiry into the real defects of the Constitution to a representative Commission, whose report will afford an effective means of enlightening public opinion on the real issues. The pamphlets explanatory of the referenda, and those attacking proposals for change, which have been issued in the past, have all been essentially partisan in character, and it is hardly surprising that the average elector has felt too dubious of the necessity of change or the wisdom of the actual changes proposed to give his vote for the projects submitted by successive Governments. In one most important respect, however, agreement with the States has already paved the way for action. The failure of the referendum in 1910 on the issue of fixing the grant to be made by the Commonwealth to the

[1] 60 O.L.R. 654. [2] 5 Can. Bar. Rev. 634, 635. [3] (1897) 5 B.C.R. 600.

States, on the expiry of the period for repayment of three-quarters of the net custom and excise revenue to the States, left it open for Parliament to make the change by simple Act, and therefore it was in the power of the Commonwealth to repeal, as it did in April 1927 by the State Grants Act, the Surplus Revenue Act of 1910, under which the States received 25 shillings per head of population as a subsidy. This power compelled [1] the States to enter into negotiations for a new financial settlement, which was reached after a Conference between the States and the Commonwealth at Melbourne in June. The essential basis of the agreement then achieved, which, of course, must be approved ultimately not merely by the State Parliaments but by the people, as it involves alterations in the Commonwealth Constitution, is the taking over by the Commonwealth of the whole of the public debts of the States on July 1, 1929, and the provision by joint action of the States and the Commonwealth for the discharge of these debts in a period of fifty-eight years, from July 1, 1927. For this purpose the Commonwealth will pay annually £7,584,912, being the amount paid to the States under the Surplus Revenue Act, 1910, for the year 1926–7, in respect of interest charges, the States finding the balance ; a sinking fund of 7*s.* 6*d.* per cent. will be set up, to which the Commonwealth will contribute 2*s.* 6*d.*, the States the balance. Future loans will be managed on behalf of the Commonwealth and the States by an Australian Loan Council representing the Commonwealth and the States ; they will be paid off in fifty-three years by means of a sinking fund of 10*s.* per cent., contributed equally by the Commonwealth and the States concerned, and the system of joint action has already been adopted, pending the confirmation of the whole scheme, in the loan floated by the Commonwealth and four States in November 1927. The Loan Council will yearly decide how much money can be borrowed for the Commonwealth and the States with due regard to market conditions ; if the demands made are, in its opinion, excessive, it will be able by a majority vote (each State having one vote, the Commonwealth two and a casting vote) to fix the total to be borrowed. But apportionment of the total thus arrived at must be unanimous, or on the basis of one-fifth to the Commonwealth, and the balance to the States in the proportion for each which its net loan expenditure for the last five years bears to the net loan expenditure of all the States in that period. If again unanimity is not reached as to the allocation of the proceeds of any individual loan, it must be allocated in proportion to the total to be raised for each Government during the year. An essential part of the settlement is the agreement by the Commonwealth to end the long disputes over the value of State properties transferred under the federal scheme to the Commonwealth ; the Commonwealth

[1] See Mr. Theodore's complaint, *Commonwealth Parl. Deb.* 1927, pp. 126 ff., and Mr. Watt's admissions, *ibid.*, pp. 187 ff. For Mr. Bruce's explanations of the motives of his Government and their desire to be not only just but generous to the State, see *ibid.*, pp. 34 ff.

from July 1, 1929, will assume liability for State debts with interest at 5 per cent. on a total of £11,036,000, while all claims of the States on the Commonwealth will cease. It will be necessary to amend the Commonwealth Constitution to achieve finality, and it is proposed to obtain by referendum approval for the grant to the Parliament of the Commonwealth of power, for the purpose of carrying out any agreement with the States, "to make laws with respect to the public debts of the States, including (*a*) the taking over of such debts by the Commonwealth; (*b*) the management of such debts; (*c*) the payment of interest and the provision and management of sinking funds in respect of such debts; (*d*) the consolidation, renewal, conversion and redemption of such debts; (*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and (*f*) the borrowing of money by the States, or by the Commonwealth for the States." This means, of course, a considerable limitation on State autonomy, but there is no possibility of denying the wisdom of the scheme as a whole or the prudence of putting it in force as far as is practicable pending the final enactment of the proposals by the States and the Commonwealth.

The Imperial Aspect of the Scheme.—From the point of view of the Imperial Government the scheme has a direct interest in that it will, when fully operative, substitute the Commonwealth acting for the States as the borrower, and will remove the possibility of questions arising between the Imperial Government and any State Government as to the passing of legislation impairing the security on the strength of which any State loan has been raised. The admission of any State or Dominion stock to trustee security rank has been dependent on recognition of the right of the Crown to disallow any act impairing the security of the loan thus admitted; fortunately as regards the States no such action has ever been seriously contemplated, while under the new system any possibility of repudiation may be ruled out. Indirectly one rather curious result will be achieved. Hitherto it has been possible, as in the case of Queensland,[1] for the financial houses in London to bring pressure to bear on a State which seems to treat British interests unfairly by opposing difficulties to the raising of new loans; this line of action was unquestionably effective in securing mitigation of the legislation of Queensland directed against oversea holders of interests in pastoral leases. Under the new system it will clearly be very difficult to block a loan under Commonwealth auspices merely because a portion of it may be allocated to a State whose treatment of British investors in its land or its tramways is not viewed with favour in the United Kingdom.

The High Court as Interpreter of the Constitution.—Once more[2] the unavailing effort has been made to induce the Privy Council to render ineffective the determination of the Commonwealth Parliament as

[1] See Keith, *War Government in the Dominions*, p. 260.

[2] See *Journal of Comparative Legislation*, Third Series, vol. v, pt. iv, p. 278.

expressed in 1907 [1] to confine to the High Court the decision of every issue involving the constitutional rights of the Commonwealth *vis-à-vis* the States. On November 15 the Privy Council dismissed the petition of Messrs. Ryland Brothers (Australia) Ltd. for leave to appeal from a decision of the High Court of the Commonwealth in which it was laid down that the Supreme Court of New South Wales had no jurisdiction to entertain a suit by the appellants as to the validity of an award made by a Conciliation Committee under the Commonwealth Conciliation and Arbitration (Amendment) Act, 1926. The questions raised by the firm were whether it was possible for the chairman of such a Committee to give a decision when the employers' and employees' representatives on the Committee were equally divided in opinion, without the assent of the employers' representatives; whether an award made by a majority so obtained was in law an award within the meaning of the Act; and whether the provisions of the Act forbidding the questioning of any proceeding or decision of a Committee prevented the Supreme Court of New South Wales restraining the action of persons arrogating to themselves the functions of a Committee and declaring such proceedings void. An award was issued on the strength of the casting vote of a chairman of a Conciliation Committee requiring the firm to increase largely the rates of pay for piecework, and the firm brought an action asking for an injunction against the enforcement of the award. Judgment was given in the first instance against the firm, but on appeal the Supreme Court of New South Wales by a majority allowed the appeal and declared that the award was not binding on the appellants. On appeal, however, by the respondents to the High Court of the Commonwealth it was ruled that the Supreme Court of New South Wales had no jurisdiction to decide the suit, and it was from this decision of the High Court that a hopeless attempt was made to obtain leave to appeal. There can be no doubt that in matters involving the rights *inter se* of the Commonwealth and the States or of two or more States the Supreme Courts have no jurisdiction, though their unwillingness to admit that such questions are really involved is natural enough, for no Court is anxious to admit loss of jurisdiction. In one matter the High Court has, for its part, asserted a claim of very dubious validity. It has ruled that, if a decision is given by a Supreme Court and it involves a matter which, in the opinion of the High Court, is beyond the jurisdiction of the Supreme Court, no appeal lies to the Privy Council from the decision of the Supreme Court.[2] It is impossible to follow this reasoning, which runs counter to the decision of the Privy Council in *Webb* v. *Outtrim*.[3] It is clear that, if the Supreme Court decides a matter in which it has no jurisdiction, the decision is a nullity, but there is nothing whatever to prevent the Privy Council

[1] See Keith, *Responsible Government in the Dominions*, iii. 1368 ff.

[2] *The Commonwealth* v. *Kreglinger & Fernau, Ltd.*, 37 C.L.R. 393. Cf. *The Commonwealth* v. *Limerick Starch Co.*, 35 C.L.R. 69.

[3] [1907] A.C. 81.

deciding the question whether or not the matter in question is really one in which a Supreme Court is deprived of jurisdiction, and no assertion by the High Court denying the validity of an appeal in such a case can have any value.

The New South Wales Election.—It is impossible not to regard with satisfaction the fact that a general election, induced by the firmness of the Governor, has at last terminated the state of confusion in the politics of New South Wales.[1] The general election gave the Nationalist party thirty-five seats, to which fall to be added the thirteen of the Country party, while Labour secured forty and Independent Labour two; the Ministry is now composed of a coalition between the Country party and the Nationalists, four out of the fourteen members of the Government being chosen from the former body. One essential issue has now to be faced by the majority in the Assembly, the question of the future of the Legislative Council. The events of Mr. Lang's troubled Ministry have proved that, with the abrogation of any understanding between the parties as to the desirability of maintaining an effective revising chamber, it is inevitable either that the Council should be reformed or that it should disappear, and New South Wales follow the example of Queensland in legislating by one house alone. It would be difficult to commend such a course of action, but there are the usual difficulties in making any satisfactory change in the composition of the upper house. The election, however, has proved that public opinion in New South Wales has not viewed with approval the efforts made by the late Premier to strain the prerogatives of the Crown in the interests of his political party, and it affords full confirmation of the effective use of his position by Sir Dudley De Chair in order to secure that the deliberate will of the people shall be the governing authority in the affairs of the State.

Representative Government in Queensland.—Fortunately in Queensland also the essential principles of democracy have been very firmly asserted by the Labour Premier in circumstances which offered every temptation to irresolution. The issue involved was whether railwaymen employed on the Government railways were to be at liberty at the discretion of their Union to refuse to handle traffic for a mill at which a strike was in progress, or whether they must obey the orders of the Commissioner in charge of the railways. The Commissioner was authorized to dismiss the whole body of railway employees, re-engagement being offered to such as would sign an undertaking to obey the rules of the service, and after a few days' struggle the firmness of Mr. W. McCormack met its just reward in the surrender of the malcontents and in the reinstatement of the men on an undertaking to obey the rules of the service. The issues were put frankly by the Premier in the Assembly on September 6, 1927, when he found that, while the Opposition gave him wholehearted support, some of his followers were inclined to put their duties to their Union above their duties to their constituents. He

[1] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, p. 252.

readily admitted the difficult position created by a conflict of loyalties and that Labour had been cowardly in not facing the issue earlier. But he insisted that, if any member believed that, when a principle of unionism was at stake, he was bound to give allegiance to some outside body and not to Parliament, then he ought not to be in Parliament, and if Government gave way to the authority of any outside body in a matter like that, then the final result would be revolution. It is impossible to ignore the influence on the attitude of the Government of the successful assertion by the British Government during the coal strike of 1926 of the fundamental duty of a Government to maintain the authority of the representatives of the people in Parliament against the assumption of power by any body of workers within the State.

The Troubles of a Mandatory.—Every sympathy must be felt for New Zealand in the far from easy task of the administration of Samoa under mandate. It may fairly be doubted whether any more difficult problem could have been set a country with little experience of administration of dependencies. The history of Samoa and the rivalries of Germany, Great Britain and the United States have created complex issues, including the presence of a European population expert in moulding native opinion. The unrest which has been widely prevalent, and which has been commented on not merely by unfriendly critics but by an Australian of so much experience as Sir Joseph Carruthers, has no doubt been due in some measure to dissatisfaction felt by the European population with the regime of prohibition, while in some measure efforts to secure control of the copra output may be responsible for intrigues. It is doubtless unfortunate, in view of the existence of the mandate, that it was found necessary to amend the Samoa Act, 1921, in order to give the Administrator power to deport Europeans from Samoa for a period not exceeding five years, and to order any Samoan to remove to a defined part of the islands for a period up to two years. The power can only be exercised if the Administrator is satisfied after inquiry, the accused having full opportunity of defence, that the person proceeded against is hindering or preventing the execution by the Government of its functions and duties under the mandate or the administration of the executive Government of the territory, and any order made by the Administrator may be revoked, absolutely or conditionally, if authorized by the Governor-General in Council. It is natural that the wide authority thus given to the administration should have been unfavourably commented on by the opposition in New Zealand, but the Supreme Court has inevitably upheld on October 20, 1927, the legality of the power of the Parliament of New Zealand to legislate for Samoa. The issue was in fact concluded by the consideration that the legislation of New Zealand has been deliberately based on the Imperial Order in Council of 1920 under the Foreign Jurisdiction Act, 1890, which gives power to the Dominion Parliament to legislate for the territory.[1] But for this Order

[1] Keith, *War Government in the Dominions*, pp. 262, 263.

in Council it may be assumed that the New Zealand Court, which had denied the power of New Zealand to legislate with extra-territorial effect,[1] would have refused to admit that New Zealand could regulate the government of its mandated territory. Curiously enough, in the case of the Union of South Africa, where power to legislate extra-territorially is assumed as flowing from the mandate, the Privy Council has never been given an opportunity to pass on this issue. It is, however, clear that, despite the legality of the Dominion legislation, it is most desirable that a better state of feeling should be introduced as between the natives and the resident European population and the administration, and the appointment of a Royal Commission is evidence of the anxiety of the Dominion Government to meet all reasonable criticism. It is noteworthy that the taking of the power to deport was defended on the ground of a like power enjoyed under the Pacific Order in Council by the High Commissioner for the Western Pacific, but it may frankly be admitted that the power was given in very different circumstances and that its use has been extremely restrained. While, again, it is easy to understand the restiveness of the Dominion Government at the criticism of the Permanent Mandates Commission of the League, the fact remains that the Commission was created to exercise a supervision of the proceedings of mandatory powers and that, while it cannot interfere with their actions, it cannot be denied the right to ask for information and to comment on errors which it may believe to exist.

New Zealand and the Ross Dependency.—In yet another matter, as Sir James Allen has pointed out,[2] New Zealand has come into contact with possibilities of divergence of views as to the rights of foreign Powers. The question has been raised as to the right of subjects of the Scandinavian kingdoms to receive licences to fish for whales in the Ross Sea, in view of the desire of the New Zealand Government to limit the issue of such licences. The legal position in this case is far from being as satisfactory as in the case of Samoa. Under an Imperial Order in Council of July 30, 1923, the coasts of the Ross Sea with the adjacent island and territories were pronounced a British settlement within the meaning of the British Settlements Act, 1887,[3] and the Governor-General of New Zealand was created Governor of the settlement which was styled the Ross Dependency. Further, the Governor is "authorized and empowered to make all such rules and regulations as may lawfully be made by His Majesty's authority for the peace, order and good government of the said dependency, subject nevertheless to any instructions which he may from time to time receive from His Majesty or through a Secretary of State." Action has been taken by the Governor-General under this power, but the question arises whether the authority which the Order in Council purports to convey can validly be conferred on the Governor-General. Now s. 2 of the

[1] *R.* v. *Lander*, [1919] N.Z.L.R. 305.
[2] Legislative Council Debates, June 24, 1927.
[3] 50 & 51 Vict. c. 54.

British Settlements Act, 1887, confers on the Crown the power to establish by Order in Council all such laws and institutions as may appear to be necessary for the peace, order and good government of British subjects or others in British settlements within the meaning of the Act, and *prima facie* the wide power granted might seem to be sufficient to authorize the delegation of authority to the Governor-General of New Zealand. But s. 3 of the Act of 1887 expressly enacts that the Crown may delegate to any three or more persons within the settlement all or any of the powers conferred on the Crown in Council by the Act, and this definite and specific provision seems to rebut the presumption created by the wide language of s. 2, and to render it necessary to understand the Act in the sense that the Crown may legislate by Order in Council or may delegate legislative power to three or more persons within the settlement, and not otherwise. This interpretation has unquestionably been that normally placed on the Act in practice, and it is strongly supported by the terms of the Pacific Islands Regulations (Validation) Act, 1916.[1] That Act, as it is expressly recited, was passed because doubts had arisen[2] whether in view of the terms of s. 3 of the Act of 1887 the delegation to the High Commissioner of the Western Pacific of the power to make regulations by Art. 108 of the Pacific Order in Council, 1893, was valid as regards such parts of the area within his jurisdiction as consisted of settled colonies, and it validates such regulations as had been made before the passing of the Act in virtue of the power which had been given, doubtless by inadvertence, in 1893, the point in question having then and later escaped notice. In view of this Act it is difficult to feel any confidence that it would be possible to uphold against challenge the validity of the Governor-General's regulations, and it would certainly seem that any legislation for the Ross Dependency should be passed by Imperial Order in Council or be enacted by three nominees at least in the Dependency.

The End of the Flag Controversy in South Africa.—It is a matter of great importance that the Union Government almost at the last moment was induced, largely by the efforts of Mr. Tielman Roos, whose term of office has developed in him a marked sense of responsibility, to arrive at a compromise on the vexed issue of the flag.[3] General Hertzog with admirable grace signalized his conversion to compromise by delivering in English the announcement on October 26 of the solution of the impasse arrived at. The essence of the agreement is the decision that the new national flag, which will be the specific South African flag, while the Union Jack will symbolize the association of the Union with the rest of the British Commonwealth, will consist of three horizontal stripes, orange, white and blue, and in the centre the Union Jack, the Orange

[1] 6 Geo. V. c. 9.

[2] I raised the question several years earlier, but legislation was not then held urgent, though admitted to be requisite in the long run.

[3] *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, pp. 244, 245.

Free State flag and the Transvaal Vierkleur will each appear unmutilated; they will thus be about three times as large as was proposed in the Governmental design as finally carried in the lower house, and, though General Smuts mentioned that he would have preferred the national ensigns to be given a larger area of the flag, he had no hesitation in accepting the compromise suggested by General Hertzog. The Union Jack will be flown with the national flag from the Houses of Parliament, the principal Government buildings in the capitals of the Union and the provinces, in ports, on Government offices abroad, and such other places in the Union as the Government may decide. The Governor-General may by regulation fix the form in which the flags may be flown on ships on the high seas, or for special purposes and occasions. It is understood that there will in any case be no abrupt change in usage, that the Union Jack will continue to be displayed in such towns as Johannesburg, Kimberley and Grahamstown, and that it will be regularly used in Natal, where, of course, British sentiment runs high. For the use of any but the Union Jack with the Union badge on merchant ships the assent of the Imperial Government is, of course, requisite under the Merchant Shipping Act, 1894, s. 73; but, if it is desired, it will doubtless be forthcoming, though clearly the question is one which should properly be dealt with by agreement at the Imperial Conference, being bound up with the difficult issue of the regulation of merchant shipping. The satisfaction with which the solution was received in the Union was unhappily marred by an indiscreet interview with Dr. Malan, Minister of the Interior and protagonist of the Flag Bill, published in the Nationalist newspaper *Ons Vaderland* on November 2, in which he said: "Such a thing as the Empire does not exist. We are absolutely free, so free that if England to-day were in a state of war it would not even be necessary for us to declare our neutrality. The Union Jack simply shows we are on friendly terms with England." Taken in conjunction with the further remark that "the difference between the national flag and the Union Jack is that the former flies over us, while the latter flies between us and England," this statement not unreasonably evoked protests, which were, however, effectively silenced by the emphatic dissent from Dr. Malan's views expressed on November 2 by Mr. Tielman Roos and by General Hertzog's suggestion [1] that Dr. Malan had failed to express himself with his usual accuracy. The Union Government, accordingly, is in no way committed to the untenable doctrine that the Union can under international law remain at peace, while the United Kingdom is at war.[2] The desirability of the cessation of racial strife is accentuated by the fact that General Hertzog's Government has undertaken the most serious task of seeking to carry through important changes in native policy.

Southern Rhodesia and Native Policy.—It was only to be expected that Southern Rhodesia should adopt the point of view on native questions

[1] *Natal Witness*, November 3, 1927.

[2] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, p. 243.

which appealed to the Union, and the legislature has now given formal approval to the report of the Southern Rhodesia Land Commission of 1925, except in so far as concerns the proposal of the Commission to leave a certain portion of the land as neutral areas. The essential nature of the proposals of the Commission, which have received also a general concurrence from the Imperial Government, is to adopt the principle of segregation of the European and the native races in respect of land ownership; it is proposed to allocate 7,250,000 acres for natives to purchase and hold on individual tenure, while 17,000,000 will be marked out for European occupation, making with the total of the native reserves already set apart a total of over 29,000,000 acres for the natives and 48,000,000 for Europeans, while 17,000,000 will remain undisposed of for the present. It is estimated that the amount of land set aside for native individual tenure should suffice for their needs for forty years, while in due course individual tenure may be introduced into the reserves which at present are held on communal terms. The scheme contemplates the rule that any native who purchases land in the individual tenure area shall cease to hold any interest in communal land; that natives who have to leave European areas may be allowed for a time to occupy on payment of rent Crown land or alienated land in the individual tenure area; and that natives settled on unalienated lands in the European area shall be encouraged to remove thence either to reserves or to native purchase areas, while the expropriation of natives who have acquired lands in European areas may be simplified by a system of exchanges. Whatever may be thought of the proportion of land allotted to the two races or of the practicability of the scheme, it is clearly animated by good intentions, but it raises certain constitutional difficulties. S. 43 of the Constitution provides that a native may acquire, hold, encumber and dispose of land on the same conditions as a person who is not a native, and the new measures clearly make a vast inroad on this principle. It is true that, as the late Sir Charles Coghlan—whose death has deprived the country of a distinguished citizen and public servant—pointed out in the legislature, the section does not expressly provide that the native may hold land anywhere, but it would be difficult, if not impossible, to frame legislation to reserve areas for Europeans which would not run counter to it, and it would be distinctly unsatisfactory and indeed wholly contrary to the terms of the Constitution to effect the result by making the permission of the Government necessary for every alienation, and then withholding assent in every case in which a native sought to acquire land in a European area. It is, therefore, necessary for the due carrying out of the scheme that the limitation should be removed, and the question arises whether the section can be altered by the legislature. The Constitution by s. 26 (2) excludes the sections on native administration, including s. 43, from alteration by the legislature, but s. 5 of the Colonial Laws Validity Act, 1865,[1] expressly provides that "every representative

[1] 28 & 29 Vict. c. 63.

legislature shall, in respect of the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony." It appears to me, therefore, that in this as in other cases the letters patent are *ultra vires* in so far as they purport to cut down an authority expressly granted by the Colonial Laws Validity Act. The power given by that Act is not restricted in any manner, save as regards the form of legislation, and though, of course, any attempt to legislate by the legislature could be defeated by withholding of assent, it seems clear that an Act duly assented to would be operative in law. Fortunately, the Constitution [1] reserves power to the Crown to alter the sections of the Constitution which are attempted to be reserved from change by the legislature, and the simplest course of procedure would doubtless be the issue of fresh letters patent modifying the section affected, so as to permit of the setting aside of lands for European and native occupation respectively. It is characteristic of the trend of opinion towards that prevalent in the Union that Mr. Hadfield expressed the wish that the question of depriving the natives of the franchise for the legislature should be taken up, and that he claimed the reversion for the colony of the adjacent area of the Bechuanaland Protectorate. When it is remembered that the Union has the aim of securing control of that protectorate, it is clear that the Imperial Government may have a difficult question of priorities to decide if it finally decides to surrender the Protectorate to the tender mercies of either of the colonies.

Constitutional Practice in the Irish Free State.—A further step [2] has been marked in the progress of the Irish Free State towards normal constitutional conditions by the successful formation of Mr. Cosgrave's new Government, and the appearance as a normal and effective opposition of Mr. de Valera and his followers. The narrow victory of the governmental candidate at the by-election necessitated by the election of Mr. Cosgrave for two seats has shown how closely balanced the two great parties are in the country, and the Government has undoubtedly a difficult rôle to play, when it must depend for its existence on the support of the Independents, who are not pledged to maintain it in office. But the decision of Mr. Cosgrave on the occasion of the defeat of the Government in November 1927 on the proposal to set up a Commission to investigate the grievances of ex-servicemen has shown wisdom and moderation. In lieu of adopting the principle that the administration must insist on reversing the effect of the defeat by a vote of confidence, which doubtless could have been obtained, he sensibly concluded that his duty was to give effect to the vote of the Dail, and to proceed with

[1] Clause 61 of the Letters Patent, September 1, 1923.

[2] *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, pp. 248–52.

business. It is in fact obvious that in a comparatively small house, with more than two parties, government can never be satisfactorily conducted if the Government is to make every small reverse an occasion for resignation or for demanding a vote of confidence, and the precedent set, unquestionably in difficult circumstances, should prove of considerable value for the future of Irish government. The effort naturally made by the Opposition to secure the repeal of the Public Safety Act as involving excessive interference with the liberty of the subject failed on a strict party vote; but the strength of the opposition removes any reason to suppose that the Act will be drastically employed, and it may ultimately be possible to deprive it of its objectionable features.

The Legal Effect of the Treaty.—An interesting effort was made in the case of *Wigg* v. *Attorney-General of the Irish Free State*[1] to establish that no action could be brought regarding the basis on which compensation should be paid to officers who were transferred as a result of the treaty of 1921 to the service of the Irish Free State. Art. 10 of the treaty provides for the payment of fair compensation to persons retiring from the Civil Service as a result of the change of Government, and the appellant claimed that the sum awarded him was on several grounds inadequate. The Supreme Court of the Free State decided on appeal that no action lay, and that no declaration could be made by the Courts on the matters referred to. The essential issues as to jurisdiction were two; in the first place, did the Article in question confer any legal right enforceable by an individual citizen, against the Irish Free State Government? Secondly, assuming that it created an enforceable right, was not the right subject to the rule applicable to pensions in the United Kingdom under s. 30 of the Superannuation Act of 1830 and s. 2 of the Act of 1859, which leaves the final decision as to the grant of a pension, otherwise duly earned, to the executive Government? The Privy Council clearly recognized that a treaty *per se* would not enable an individual to claim under its terms, but it was pointed out that the Article had been adopted into the municipal law of the Irish Free State by Act No. 1 of 1922 as well as by the Provisional Government (Transfer of Functions) Order, 1922, clause 7, which is made under an Imperial Act and has, accordingly, full effect in the Irish Free State. The second point was more difficult; the compensation contemplated by the treaty and made statutory was to be that provided for in the Government of Ireland Act, 1920, under which a Civil Service Committee was to pass finally on any disputed case. As the result of the establishment of the Free State, the Committee never came into being as far as the Free State was concerned, and the Irish Government claimed that the Minister of Finance of the Free State must be deemed to take the place of the Committee. This contention, plausible as it was, was rejected definitely by the Privy Council, which ruled that the machinery contemplated having failed, the question must be decided by the Courts, and that the mode of procedure adopted, that for a declara-

[1] [1927] A.C. 674.

tion of right against the Attorney-General, was the proper mode in accordance with the decision in *Dyson* v. *Attorney-General* [1] and other cases. It is worth recording that, though the Courts decided against the Free State on certain points, no suggestion was made that the Government was in any way desirous of restricting unfairly the compensation payable.

The Free State Government and the First Dail Eireann.—A decidedly remarkable issue was decided by the Supreme Court of the Irish Free State in the case of *Fogarty* v. *O'Donoghue*.[2] During the period of rebellion against the authority of the Crown there was set up the body known as the first Dail Eireann, which claimed to be the National Assembly of Ireland and undertook the duty of establishing a republic. Funds were collected for this end, and the question which was presented to the Irish Courts was whether the Irish Free State could claim the amounts, one of the trustees of the funds objecting to the transfer of the sums to a body which did not represent a republican Government. The decision both of Murnaghan J. and of the Supreme Court was against the contention of the trustees. It was laid down that the Government of the Irish Free State was now the established government of the country both *de iure* and *de facto*, and that, whether it was to be described as a restored Government or as a new Government, it was entitled to the funds in dispute, on the principle laid down in the case of *The King of the Two Sicilies* v. *Willcox* [3] and *United States of America* v. *Prioleau* [4] and *United States* v. *M'Rae* (No. 2).[5] The hesitation of the trustee to surrender control of the funds was penalized by the Court below through the refusal of costs, but the Supreme Court more generously held that, as the funds were large and as proceedings were on foot in New York to prevent the handing over of the funds, he was entitled to the protection of an order of Court and, therefore, to his costs. Somewhat unkindly, however, the majority of the Court ruled that he must pay the costs of his appeal against the decision of the lower Court, on the score that it is only in the most exceptional cases that a trustee who appeals unsuccessfully against the decree of a Court is allowed the costs of the appeal.

Indian Constitutional Reform.—It was most unlucky that a certain maladroitness in announcing the appointment of the Statutory Commission contemplated under the Government of India Act, 1919, should have obscured in the minds of Indian politicians the importance and value of the step taken. The impression that Indian opinion was being slighted could hardly have been conveyed if the full announcement of the intentions of the Government had accompanied the intimation of the creation of the Commission. It is, of course, clear that the final responsibility for any further constitutional change in India must rest with the Imperial Parliament, but, as the work of the Statutory Commission is merely

[1] [1911] 1 K.B. 410; [1912] 1 Ch. 158.
[2] [1926] Ir. R. 531.
[3] 20 L.J.Ch. 417; 1 Sim. (N.S.) 301.
[4] 2 H. & M. 559.
[5] 38 L.J.Ch. 406; L.R. 8 Eq. 69.

advisory, there was no reason *a priori* to assume that its personnel would be confined to members of that Parliament, and it is easy to understand how much disappointment the announcement of the personnel caused in India. In point of fact the procedure contemplated is obviously the wisest in the circumstances. Any selection of Indian personnel would have raised grave difficulties, and, as matters stand, the Legislative Assembly and the Council of State will be able to select a Joint Select Committee, which will have the power to draw up proposals for submission to the Commission for examination in such manner as the Commission may decide. Common sense shows that in effect this gives the most effective opportunity for full consultation between the two bodies, and a like procedure is contemplated regarding the provincial legislatures. Moreover, the report of the Commission when arrived at will merely be one of the matters which will be considered by the Joint Select Committee of the two Houses of Parliament, to which the matter will be referred by the Imperial Government ; the views of the Indian Legislature will be laid before it by delegates who will be invited to attend and confer with the Joint Committees, thus ensuring that legislature a full share in determining the next step in the constitutional development in India. The terms of reference to the Commission are wide and satisfactory ; it is " to inquire into the working of the system of government, the growth of education, and the development of representative institutions in British India and matters connected therewith," and the Commission shall report as to " whether and to what extent it is desirable to establish the principles of responsible government, or to extend, modify or restrict the degree of responsible government then existing therein, including the question whether the establishment of second chambers of local legislatures is or is not desirable." Further, the appointment was not due under the original Act until December 1929, and its acceleration, which has necessitated a special Act, is an indubitable sign of a desire on the part of the Government to co-operate with responsible opinion in India, despite the excuse for hesitation which might have been afforded by the unhappy recrudescence of communal strife in that country.

Constitutional Reform and Defence.—The acceleration of the despatch of the Statutory Commission cannot be regarded as unconnected with the problem of defence presented to the Imperial and the Indian Governments by the recommendations of the Skeen Committee [1] in favour of the Indianization of half the cadre of officers in the Indian Army, the establishment of an Indian Sandhurst, and the recruitment of Indian officers in those arms of the defensive forces paid for out of Indian revenues from which they are at present excluded. The somewhat artificial character of the present constitutional arrangements is well illustrated by the objection raised by the Foreign Secretary in the Indian Assembly on August 25, 1927, to the discussion by Dr. Moonje of the menace to India which might be presented by Afghanistan when completely organized

[1] Indian Sandhurst Committee Report, November 14, 1926.

in a military sense. The Speaker naturally permitted the matter to be referred to, as upon it rests at present the most vital issue of Indian defence. In effect, it is clear that any real progress in the question of Indianization of the army must rest on the decision as to the future constitutional developments. Any desire to accelerate responsible government in central matters must mean a determined effort to hasten the time when India can undertake her own frontier defence ; delay of further extensions of responsible government would logically accord with great caution in army reform in the sense recommended by the Skeen Committee. One thing is clear on principle : no responsible government on an extended basis is possible so long as Indian defence rests essentially on the employment of British troops, and it is satisfactory that Indian politicians are showing an increasing readiness to appreciate the fundamental importance of the creation in India of an effective corps of officers capable in due course of supplying the commanders requisite for the Indian armed forces. On the other hand, it is obvious that it is impossible to justify any prolonged extension of the closing of certain branches of the service to Indians, and that the principle of steady training of Indian officers to take over responsibilities once borne by Europeans only, which has long prevailed in the civil administration, must without needless delay be applied to the armed forces. The process, inevitably, cannot be rapid, but that is no reason for prolonged delay in applying it.

The Maltese Constitution.—Satisfaction must be felt with the decision of the Imperial Government to terminate the long-protracted discussion of the Military and Combined Training Ordinance, 1927, by making a graceful concession to the wishes of the Maltese Parliament. The offending clauses of the Ordinance was the provision which required that claims for damages done by military training or by the combined training of the several services should be settled by arbitration excluding the intervention of the Courts in respect of the arbitral proceedings. However much sympathy may be felt with the indignation of the Maltese Parliament at the substance of this legislation by the Governor under the defence power reserved in the Constitution,[1] it is impossible to accept the suggestion that the Ordinance was in any sense *ultra vires*, for the provision impugned was clearly ancillary to legislation for defence. On the other hand, it is apparently the case that no real accusation of bias can be brought against the Maltese Courts for their action in such questions, and, as an appeal lies to the Privy Council, it is obvious that, if these Courts should misdirect themselves on points of law, they can be set right on appeal. Fortunately the issue has been disposed of by the addition to the Ordinance of a section permitting appeal by either party from the finding of arbitrators to the Maltese Court of Appeal, provided that the appeal is made within seven days of the final adjudication, thus precluding needless delay in settling compensation for damage. The

[1] Clause 12 of the Letters Patent constituting the Office of Governor, April 14, 1921 ; clause 41 (1) of the Malta Constitution Letters Patent, 1921.

instance illustrates how difficult it is, with the best of goodwill on either side, to secure the smooth working of a complex Constitution, and it may be noted that the Constitutional party when in opposition was as critical as the Nationalist Government of the action of the Governor, while a not unsuccessful effort was made to secure the benevolent intervention with the Imperial Government of Lord Peel and other members of the Empire Parliamentary Association on their visit in January 1927 to Malta. One minor improvement in practice may legitimately be expected from the new administration resulting from the defeat of the Government by a coalition of the Labour party and the Constitutionalists. The artificial rule that English and Italian shall be the official languages will be modified in practice by the rendering into Maltese, the true vernacular of the working classes, of all governmental notices, etc., which interest them.

The Sovereignty over Mandated Territories.—It was perhaps inevitable that the declaration of the Union Government in the agreement with Portugal as to the boundary of South-west Africa,[1] in which it is declared that, subject to the terms of the mandate, the Government of the Union possesses sovereignty over South-west Africa, should have raised comment by the Mandates Commission of the League of Nations. It is not, of course, unnatural that the phrase should have been employed. The Government of the Union is entitled to rely, as it has done, on the fact that the Appellate Division of the Supreme Court declared in the case of *Rex* v. *Christian*[2] that the *maiestas* or sovereignty over South-west Africa resides neither in the principal allied and associated Powers, nor in the League of Nations, nor in the British Empire, but in the Government of South Africa, which has full powers of administration and legislation, subject, of course, to the terms of the mandate. With this doctrine may be contrasted that arrived at, after a patient investigation of the conflicting possibilities, by Dr. Stoyanovsky,[3] who holds that sovereignty resides in the people of the territory, but its exercise is provisionally confided to a power which acts in the capacity of the tutor of a minor, the relation being guaranteed by an international control resulting from the mandate entrusted by the League of Nations to the mandatory power. Such a view, inevitably, is far less favourable to the exercise of complete control than that adopted by the South African Court, but it has in any case suffered derogation in the case of South-west Africa from the decision of the League to permit the passage of the Act of the Union of South Africa under which the German residents have been allowed to obtain wholesale British nationality in the Union.[4] Moreover, the Union view alone accords with the virtual decision to

[1] *Parl. Paper*, Cmd. 2777.

[2] [1923] A.D. 101, 122; cf. *Journal of Comparative Legislation*, Third Series, vol. vi, pt. iv, pp. 245–50.

[3] *La Théorie générale des Mandats internationaux*, pp. 67–86.

[4] *Ibid.*, pp. 93 ff.; Union Act, No. 30 of 1924.

manage South-west Africa on the lines of a province of the Union and to enforce in it the doctrine of the subordination of native to European interests. Juridically the position is unquestionably open to dispute, for the decision of the Supreme Court can naturally not be expected to carry much weight outside the Union, nor in fact was the doctrine laid down really essential to the decision of the case under discussion, which might have been disposed of without seeking to define the exact distribution of sovereignty. The matter is one of conflicting ideals; to the Union South-west Africa is essentially, as General Smuts wished it to be, an annexed territory, which is to enjoy the Union flag as its national flag on the coming into effect of the Union Nationality and Flag Act.

The Limits of Certiorari and Prohibition.—A useful reminder of the limits of the prerogative writs of prohibition and *certiorari* is afforded in the case of *Rex* v. *Legislative Committee of the Church Assembly and the Church Assembly, Ex parte Haynes Smith.*[1] The attempt there made to secure the application of the doctrines laid down in *Rex* v. *Electricity Commissioners*[2] was perhaps natural, but it was clearly very difficult to establish the essential fact that the Church Assembly or its Legislative Committee was "a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially."[3] Lord Hewart C.J. doubted whether either of the bodies in question could be said to have legal authority to determine questions affecting the rights of subjects, since their position was rather that of promoting than of passing legislation, but he was clear that in any event they had no duty to act judicially; the functions of the two bodies were of a deliberative or legislative character. Avory J. pointed out that under the standing orders of the Church Assembly the House of Bishops, when it had concluded all the stages of a measure save that of final approval, was to submit it to the Convocations of Canterbury and York for their consent to its submission to the Assembly for final approval. Now it was decided in *Reg.* v. *Archbishop of York*[4] that neither prohibition nor *certiorari* lay to either Convocation, and it would be strange if these processes were available against the Assembly after a measure had received approval by both Convocations. Salter J. insisted that the true distinction was laid down in *Rex* v. *Inhabitants of Glamorgan*,[5] where Holt C.J. asserted the power of the Court to "examine the proceedings of all jurisdictions erected by Act of Parliament," and the fact that *certiorari* did not lie to remove orders made by Commissioners of Bankrupts was explained by the fact that these Commissioners had "only an authority and not a jurisdiction." Any other decision would obviously have had far-reaching effects, especially as the power of Courts in the Dominions to exercise control over judicial bodies is similar to that of the High Court

[1] 44 T.L.R. 68.
[2] [1924] 1 K.B. 171.
[3] Definition of Atkin L.J. at p. 204.
[4] 20 Q.B.D. 740.
[5] 1 Ld. Raym. 580.

in England and precedents of English action are regularly used as the basis for the application of the authority of the Courts.

Remedies against the Crown.—The case of *R.* v. *McNeil* [1] illustrates neatly the generosity of the treatment in Western Australia of claimants against the Crown under contractual rights. The Government of the State had undertaken to purchase, smelt and realize all ore sent to the governmental works by the respondents, and, a dispute having arisen under the contract, the respondents by petition of right under the Crown Suits Act, 1898, were awarded sums due under the contract together with interest from the date when the sums became due. The Crown has failed in an effort to induce the Privy Council to disallow the grant of interest, it being ruled that the relation of the parties could not be treated as merely that of buyers and sellers, but that it was also fiduciary in its nature so as to make the Government liable for interest by reason of the delay in making the payments due for the ore. It was also held that the claim was founded on a contract within the meaning of s. 33 of the Act of 1898, and that the liability for interest was one of the terms of the contract. A striking contrast may be found in the melancholy fate of the efforts of Mr. Mackenzie-Kennedy to secure by action against the Air Council compensation in respect of user of a patent, however unexceptionable in point of law are the decisions, first, that no action will lie against the Air Council for acts alleged to be tortious done in its capacity as such,[2] and, second, that the Air Council is not liable to be sued on any contract made on behalf of the Crown and that an action against it is not an admissible mode of securing such compensation in respect of user of a patent as may be legitimate under s. 29 of the Patents and Designs Act, 1907, as affected by s. 8 of the Patents and Designs Act, 1919.[3] It is impossible not to share the regret of Scrutton, L.J., that six years' litigation should have had so ineffective a result.

[1] [1927] A.C. 380.

[2] *Mackenzie-Kennedy* v. *Air Council*, 43 T.L.R. 733. Cf. *Hutton* v. *Secretary of State for War*, 43 T.L.R. 106.

[3] *Rowland and Mackenzie-Kennedy* v. *Air Council*, 43 T.L.R. 717.

NOTES.

Sir Mackenzie Chalmers.—The Society will join with the Executive Committee in deploring the death on December 22 of Sir Mackenzie Chalmers, who not only gave efficient support to Ilbert in the foundation of the Society, but has given it conspicuous service by active co-operation during the whole of its career. No one brought to bear on its work a keener legal mind or the resources of a wider experience. In him the State—we may say the Empire—loses a great public servant, whose efficiency was so marked that he was called upon to undertake many offices and employments of varied character, and in every case fully justified his selection. His administrative work was done in accordance with the best traditions of the Civil Service. Administration, however, chiefly concerns a man's own generation: Chalmers's most notable work is of a more enduring character.

Mackenzie Dalzell Chalmers was of Scottish descent, as his three names would themselves indicate: and he was, in Scottish phrase, a "son of the manse." He was born February 7, 1847, at Nonington in Kent, where his father was Rector; and there, after a full life of eighty years, he has been buried.

Educated at King's College, London, and Trinity, Oxford, Chalmers was called to the Bar at the Inner Temple in 1869, having been already appointed to the Indian Civil Service. After three years in India he returned to England and joined Herschell in his chambers for about seven years. Here he gained his intimate practical knowledge of commercial law, Herschell enjoying in those years a large practice both at Westminster and Guildhall. Most juniors assisting a busy leader are satisfied in keeping pace with the current work; Chalmers went further and studied the principles of commercial law, devoting himself first to the law of bankruptcy, then of bills of exchange, and discovering his own capacity as a draftsman. His first published work (1878) was his *Digest of the Law of Bills of Exchange* (now in its ninth edition). He had explored the whole subject, and he presented it with conciseness and lucidity in a form which showed how a vast accumulation of statute and case law could be converted into a legislative code. The matter was taken up by the Bankers and Chambers of Commerce, on whose instructions he prepared the Bill which became the famous Act of 1882. His power of concise draftsmanship was further proved by the Sale of Goods Bill, 1893, and the Marine Insurance Bill, 1906, both of which passed with little alteration.

Meantime Chalmers had in 1884 become a County Court Judge at Birmingham, which office he held for twelve years, in an interval acting as Chief Justice of Gibraltar. It is believed that he would have been promoted to the High Court, had Lord Herschell remained in office in 1896. It must not, however, be understood from this that he was in any way a political partisan. Throughout his career in aloofness from politics he maintained the traditional attitude of the Civil Service; though in the later years of his retirement he was outspoken in his contempt for parliamentary chicaneries. In 1896 he returned to India as Legal Member of Council, where again he left his mark on legislation. In 1902 he succeeded Sir C. Ilbert as Parliamentary Counsel, and in 1903 he became Under-Secretary at the Home Office, retiring from the public service in 1908. He was made C.B. in 1904, and K.C.B. in 1906.

Retirement does not, however, carry repose in the case of a man of Chalmers's capacity and experience. He had still nearly twenty years of busy life before him, employed in numerous Royal Commissions, Committees of Inquiry, etc., both before and during the War. Throughout all his time after his return from India he maintained his interest in the improvement of statute law and gave special attention to the work of the Statute Law Committee, whose useful activities during recent years owe much to his personal labour and wise counsel.

In his official work, and apart from it, Chalmers displayed his strong sense of humanity and sympathy with suffering and distress. At the Home Office he was ever careful in his supervision of the prison administration, and of the working of the Vivisection Acts. Of his spare time much was devoted to the London Fever Hospital, on the committee of which he was an active member, and during the War he was assiduous in participation with the work of the Red Cross Society and the Order of St. John.

A. G.

Town Planning.—Mr. G. Montague Harris in his presidential address to the Town Planning Institute summarized the principles underlying action in different countries. In England we depend, he said, "entirely on legislation, which has made it the duty of certain types of local authorities and has given the power to others to prepare town planning schemes for the undeveloped land within their areas; that the Ministry of Health carefully controls the action of the local authorities in the matter and watches the interests of the landowners and the public generally; that the town planning schemes, when finally approved, possess statutory authority; and that joint committees are encouraged to prepare advisory schemes for regions covering the area of a number of local authorities.

"Now, in Germany the position is quite different. There it has always been possible for the police authority to influence the development of towns by withholding its consent to building operations unless

certain conditions are satisfied. The extent to which this power has been so exercised as to amount to a town planning control depends mainly on the personality of the officials in each town or district.

" Another characteristic of German local government—the principle that a town council (to use the English term) may do anything for the benefit of the community which is not specifically forbidden it by law —affects town planning in several ways, for it enables municipalities to buy land to any extent and for any purpose and also gives them the opportunity of introducing new systems, such as the famous so-called Lex Adickes, which was a purely local institution of the city of Frankfort, called after the name of its mayor, who invented it. . . . The law embodies the principle of compulsory replotting or redistribution of land in the possession of a number of owners and has been adopted in every German State.

" On this question of general principle Holland stands in much the same position as Germany. The Dutch Housing Act of 1901 made town planning compulsory on all municipalities of more than 10,000 population and on smaller ones which showed an increase of more than 20 per cent. in five years; but before the passing of that Act, the municipalities possessed full powers regarding " public order, morals and health," and these covered the control of the development of the town, as the municipality might think fit, in the interests of the community.

" So, too, in Sweden systematic town planning has been recognized and practised at least since 1874, although it was not until the passing of an Act in 1907 that schemes were made binding on property owners.

" While these are examples of countries in which, in contradistinction to our own case, town planning may be said to have grown naturally out of previously existing powers of local authorities, we find in the United States a third and quite different process. There the initiative has come, not from the legislature nor from the local authorities, but from business circles. The first step has usually been for a body of private citizens to form a society or a committee, financed by themselves, to prepare a plan for their city. If they are successful in producing something which seems likely to be of value, the matter gets taken up by the local authority, which usually appoints a special commission to deal with it.

" France is another country which has used, as we have, the system of legislation to bring about town planning and the course and contents of that legislation are very instructive. The Act of 1919, although it contained compulsory provisions, hung fire very much, as did our Act of 1909, and a further Act was passed in 1924 to fill up the gaps. Among the many interesting provisions which this amended legislation contains, I would refer in particular to the establishment of a central commission at the Ministry of the Interior, of which the Minister is himself the president and which includes many representatives of local

authorities and technical experts; and also the provision for a similar commission for each department, which would be analogous, in this country, to a regional committee for each county. . . .

"In Italy the town planning movement is confined mainly to the development of certain of the large cities—Rome itself, Milan and Turin—while the lay-out of the new Venice on the mainland is a specially interesting effort. Spain's chief contribution to the science of town planning is the lineal city of Madrid. . . .

"Of other countries of Europe we should note that in Finland town planning legislation existed as early as 1854, and that a new Bill is in contemplation; that Czechoslovakia has established a Town Planning Institute, which has issued a number of educational propagandist pamphlets; and that the different cantons of Switzerland have a variety of town planning provisions, in which, as might be expected, special attention is usually paid to the protection of beautiful scenery.

"The 1907 Act in Sweden led to great and continued activity in town planning by the municipalities under the Royal Building Board, the central Government organ which encourages and assists the local authorities and is largely responsible for the high standard of town planning in that country.

"Denmark contains an interesting institution known as a Town Planning Laboratorium, where lectures and meetings of study groups are held. The Norwegian towns have long been active in town planning and frequently arrange competitions for plans for their extensions and suburbs. Trondhjem, in particular, may be mentioned as a city which worked out a plan for an agricultural belt, with new industrial areas beyond it and, by skilful planning, has created residential suburbs of unusual beauty.

"Poland has a town planning division in its Ministry of Health. In Greece an association has been formed to instruct public opinion in town planning ideas.

"The much debated questions, too, of a Greater Vienna, a Greater Prague, a Greater Oslo and a Greater Copenhagen are merely examples of the recognition by the big cities of the world that their future expansion must be in accord with rightly thought out principles—in other words, that they must town plan.

"In Canada town planning legislation had been passed by every Province except, perhaps, one. In Australia, New Zealand and South Africa beginnings have been made. New Zealand passed a Town Planning Act in 1926, establishing a central Town Planning Board and making town planning compulsory for the whole of the area of every city and of every borough having a population of 1,000 and upwards.

"In South Africa there seems still to be some difficulty in getting town planning actively under way, in spite of the persistent efforts of the Public Health Department of the Union.

"In India, I believe, there is no compulsory town planning except

in the province of Madras, but there are legislative town planning provisions for Bombay and Calcutta, Rangoon, the United Provinces and the Punjab, and in several of these provinces there is considerable activity.

" The Gold Coast Colony has an ordinance establishing a Central Town Planning Board and making municipal authorities responsible for carrying out schemes. In the Federated Malay States . . . there is a number of town planning committees in existence and at least four town planning administrators in addition to the Government Town Planner. Here too, much seems to be done officially in the matter of publicity and education of the general public in the aims and objects of town planning.

" In Palestine, the town of Tel Aviv is an example of the complete planning of a new town.

" The last two countries to be mentioned represent systems which differ altogether from any of those already considered—this being due in the main to their very distinct forms of Government.

" Centralization is the main characteristic of Japan's town planning system, for under the Act of 1919, not only are the municipalities to which the Act is to apply selected by the Government, but all schemes are prepared by the Home Office after consulting the local Town Planning Committee, the Mayors of the Municipalities being responsible for carrying out the plan in their governmental capacity.

" It is difficult to know for certain what is happening in Russia in any department of life, but I have had the advantage of reading a paper by M. Beloborodow, People's Commissar of the Interior, from which it is clear that the principle of town planning at any rate is fully recognized by the Soviet Government, while its practice is even more completely centralized in Russia than in Japan."

Prevention of Bribery.—Upon the twenty-first anniversary of the foundation of the Bribery Secret Commissions Prevention League a correspondent to *The Times* (November 1, 1927) supplied an account of the steps taken to submit to the League of Nations the desirability of holding an international congress in 1928 on bribery and its prevention. It contained the following record of legislation enacted upon the subject :

The Prevention of Corruption Act, 1906 (in some cases modified by the Amending Act of 1916), is in force in Great Britain, Northern Ireland, the Free State, the Isle of Man ; and in substance in Victoria, Western Australia, Tasmania, South Australia, Canada, New Zealand, South Africa, Gibraltar, Sierra Leone, Jamaica, and Southern Rhodesia. Victoria was the first—in 1905—to pass an Act, while Lord Russell's Bill was still being debated at Westminster, though the Commonwealth of Australia Federal Act was passed in the same year. All the Acts referred to are pre-war, except that of the Union of South Africa (1918). Since the War, however, at the instigation of the English League, Acts or Ordinances making bribery a crime have been passed in the Bahamas

(1920), Cyprus (1920), Uganda (1920), Kenya Colony (1920), Trinidad and Tobago (1921), Bermuda (1921), British Honduras (1927) and British Guiana (1927).

So far as commercial bribery is concerned, the only foreign country that had a special law (or special paragraphs in its Code) aimed against it was Germany (1909). Progress has been made in regard to the bribery of commercial agents in France (1919), Sweden (1920), Norway (1922), Austria (1923), Hungary (1923), Turkey (1926), Poland (1926) and Czechoslovakia (1927), and legislation on the desired lines is contemplated in other countries where the League of Nations might make assurance doubly sure.

Tramway Halts in Passing Vehicles.—*Local Government Abroad*, of which the first number was published in October 1927 in connexion with the International Union of Local Authorities, contains the result of an inquiry as to the rules in different countries regarding vehicles passing the stopping-places of tramcars.

In Belgium a general regulation of August 26, 1925, embodying a royal decree of November 1, 1924, laid down the rule that :

" At stopping-places of tramways and railways, the drivers of vehicles must slow down and must leave sufficient space for passengers to stand or to alight, stopping when necessary."

The various towns as a rule reproduce this regulation in their respective by-laws, but some have supplemented it.

In Germany the regulation of the speed of traffic is primarily a matter for the individual States, but the Central Government arranged with the State Governments in June 1926 that the latter would legislate in the matter on a uniform principle in accordance with certain accepted model regulations. These include the following :

" Tramcars which are standing at a stopping-place may be passed, on the side on which passengers enter and alight, only at a walking pace and at such a distance to the side that no danger is caused to the passengers."

In Holland the by-laws of The Hague require that riders and drivers shall " leave so much space free beside a standing tramcar that passengers shall be able to get in and out safely." Very similar provisions are included in the by-laws of Amsterdam and Rotterdam. In Haarlem drivers are forbidden to pass a standing tramcar on the side on which passengers get in or out.

In Italy the traffic ordinances of Rome, dated July 21, 1925, contain the following provision : " It is forbidden to any vehicle . . . to pass tramcars which have stopped to take up or put down passengers."

At the time of writing (December 1927) more than one London police magistrate has expressed the view that this represents the duty of motorists, though in London there is no specific legislation on the subject.

American Law Institute.—English lawyers will watch with sympathy the attempt which is being made in the United States to bring some

order out of the chaos of the law. An account of the plan of operations has lately been given by Mr. Wickersham, formerly Attorney-General of the United States.[1]

The English lawyer's search for authorities may be laborious enough, but it is child's-play to that of the American lawyer. From the Courts of every one of the forty-eight States and from the Federal Courts in addition there flows a steady stream of decisions. Taking a sample year, it was estimated that in 1917 the reported decisions in the United States ran to 175,000 pages, as against 7,000 in Great Britain.

With all the aid of digests and indexes, flesh and blood cannot prevail against it. After much consideration and greatly aided by a grant from the Carnegie Trust of $100,000 a year for eleven years, a scheme has been framed and sixty eminent lawyers, of whom forty-four are professors or instructors in law, are to attack the huge task of making a restatement of the whole law, the work on each topic being prepared by the experts in that branch. The plan to be followed is that of Dicey. On every topic there is to be (*a*) a restatement, *i.e.* a short rule with a comment, and (*b*) an accompanying treatise, the scale of which is as yet undetermined.

One may well believe that this will produce in the fullness of time an extremely valuable book, but unless the restatements are to have the consecration of the legislatures, it is rather hard to understand how the cases are to be superseded. If the whole body of American case law were to be reduced to the rank of English cases on bills which are of older date than the Bills of Exchange Act, no doubt an enormous weight would be shifted from the shoulders of American judges and practitioners. The situation would be that described by Sir Mackenzie Chalmers: "The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. The illustrations therefore must always be tested by the language of the Act itself."[2]

In this connexion Sir John Salmond has some extremely judicious remarks. Speaking of the development of law by precedents, he says: "The evils of this system of legal development are doubtless great, but they can be largely avoided by the recognition of two practical principles. The first of these is that no decision is worthy of recognition as a precedent unless it contains within itself some general principle of law as opposed to a mere determination of the individual instance. The second is that, in order to render the system of case-law tolerable, the law so developed should from time to time be formulated as statute law, so that its principles may receive authoritative expression *in abstracto* freed from the complexities of the individual decisions from which they proceed. No better system of law can be devised than a system of statute law progressively supplemented by the case law which arises from its interpretation, and superseded from time to time by a fresh formulation of

[1] *L.Q.R.*, October 1927, p. 449. [2] Chalmers on Bills, 9th ed. p. xxxix.

statute law which incorporates within itself the case law theretofore developed." [1]

How far it is within the range of practical politics to proceed in this way in the United States it is not for us to hazard an opinion.

Report of the Crown Proceedings Committee.[2]—Contrary to the common belief, there is, so far as we know, no civilized country in which the right of the ordinary citizen to judicial protection against Government is more limited, or more embarrassed by obscurities, paradoxes and pitfalls than is the case in England. The rapid extension of the activities and powers of Government departments has in the last few years alarmed even the most conservative; and in the year 1921 Lord Birkenhead appointed an exceptionally strong Committee "to consider the position of the Crown as litigant, and to propose such amendments of the law as they might consider advisable and feasible . . . and to prepare a Bill. . . ." In 1924 Lord Haldane considerably abridged the task of the Committee by requesting them "to prepare a Bill on the above lines on the assumption that the alterations in law involved therein were both desirable and feasible." The present report contains the draft Bill. Unfortunately, it does not contain any explanatory matter, or any references to the legislation or experience of foreign countries, or of other parts of His Majesty's dominions.

The draft Bill is in three parts. Part I, entitled "Crown proceedings in High Court and County Courts," is concerned with the assimilation of the Crown to the private litigant in respect of matters of procedure. Part II makes certain changes in the substantive law, of which the first and the most far-reaching is that which provides that the Crown shall be liable in tort. Part III, "Supplemental and Miscellaneous," provides, *inter alia*, that, in principle, the Crown shall be in the same position as a private litigant in respect of liability for costs.

The chief practical problem which the Committee had to solve was that presented by Discovery. This problem has not embarrassed those continental countries which, like France, have long since, by one means or another, made litigation with the State comparatively easy. Their immunity from this difficulty arises from the fact that, with them, private suitors in ordinary litigation enjoy no such right as that of Discovery. This powerful instrument of civil justice is a copyright of the English Chancellor's.

The draft Bill provides that rules may be made authorizing the Court to make orders requiring officers of the Crown to deliver to the other party a list of documents relating to the matters in question "which are or have been in the possession, custody or power of the Crown." Such list shall not contain documents "the existence of which it would be contrary to the public interest to disclose." The Crown may be prepared

[1] Modern Legal Philosophy, Series IX, *Science of Legal Method*, Introduction, p. lxxxiii.

[2] Cmd. 2842, 1927. (H.M. Stationery Office. Price 9*d*.)

to disclose the existence of a document, but not to produce it. Any such document shall be set forth in a separate schedule to the principal list "with the same particularity as is required in the case of documents for which privilege is claimed between subjects, but with no greater particularity."

The Rules may provide a power for the Court to require the production of a certificate by a Secretary of State or other Minister of the Crown to the effect that "every relevant document the existence of which can be disclosed without injury to the public interest is set forth in the list"; or that, where privilege is claimed, the production of the document in question would be injurious to the public interest. Analogous provisions are made in respect of interrogatories.

Any reader who doubts whether the time is ripe for legislation on some such lines as those of the Committee's draft Bill may, in default of the *travaux préparatoires* which the Committee have kept to themselves, profitably study Professor J. H. Morgan's introductory chapter to Mr. Gleeson Robinson's *Public Authorities and Legal Liability*. There he will learn, among other things, that it is a doubtful question whether, at the present day, the Crown can be made to refund money which, having been wrongfully extorted from a subject by a Crown officer, has by him been paid into the Treasury.

M. S. Amos.

The Protection of Women in Industry.—Mrs. Bankart, sometime Hon. Sec. of the North St. Pancras School for Mothers, supplied to the *Revue Internationale de l'Enfant*, September 1927, the following article dealing with the protection of women in industry before and after childbirth, based upon a report issued by the International Labour Office.

The large increase in the number of women employed in industry and commerce in recent years has made it necessary to enact special laws for their protection. In this brief article it is proposed to consider only the laws regulating the employment of women before and after childbirth which are in force in the States Members of the International Labour Organization, comparing them with the Maternity Draft Convention adopted at Washington in 1919.

The purpose of these laws is twofold. In the first place, they are designed to secure for the mother adequate rest, care and freedom from pecuniary anxiety before and after confinement; and, secondly, they aim at the reduction of infant mortality by provisions safeguarding the health of the baby when the mother returns to work.

The scope of the national laws, namely, whether they apply to all employment or only to specified branches, varies a good deal in detail, but in general they correspond to those of the Draft Convention.

The latter applies to both industry and commerce. The term "industry" includes work in mines, factories, building and transport, but not undertakings in which only members of the same family are

employed. " Commerce " is defined as " any place in which articles are sold or commerce carried on."

All the national laws apply to women working in industry, with the exception of those of Salvador, which specify only " commercial undertakings."

In most countries, the laws also apply to women employed in commerce, but in the following countries those so employed are not protected by law : China, Denmark, Italy, Japan, Lithuania, the Netherlands, New Zealand, Norway, South Africa and Switzerland.

Rest Periods.—One of the most important of the provisions for safeguarding the health of both mother and child is the " rest period " before and after confinement. In the Draft Convention, this is specified as twelve weeks, six before, and six after, the birth of the child. Under national laws, these periods vary considerably, from four weeks in New South Wales, Denmark, Belgium, Great Britain, Lithuania and New Zealand, to sixteen weeks in the Serb-Croat-Slovene Kingdom.

As a corollary to the law requiring " rest periods " follows that providing for " retention of employment." The Draft Convention requires that the woman's place be kept open for her during the twelve weeks' rest. Also that, should illness supervene, as attested by a medical certificate, the period during which dismissal is precluded by law must be extended, the limit of the extension to be fixed by the competent authority in each country.

The influence of the Draft Convention on the maternity laws of other nations is shown by the fact that all the laws forbidding the dismissal of a woman during the " rest period " in the following countries have been passed *since* 1919 : Argentina, Bulgaria, British Columbia, Chile, France, Greece, Guatemala, Latvia, Norway, Peru, Poland, the Serb-Croat-Slovene Kingdom, Spain and Switzerland (factories only). Other countries, so far, do not appear to have legislated on this question.

Nursing Intervals.—Another important provision affecting the health of both mother and baby is the law which requires that a mother be given opportunities to feed her baby during working hours without loss of wages. The Draft Convention provides for two such " nursing intervals " of half an hour each, and the above-mentioned countries, with the exception of Switzerland, all have this provision, the times varying slightly in duration. Denmark, Italy, the Netherlands, Portugal and Sweden also provide " nursing intervals." Some national laws require the owner of a factory employing more than a certain number of women to provide a crèche, or suitable room, where a mother may nurse her baby and leave it under proper care when she returns to work. In many cases the place provided must comply with certain hygienic regulations, and be in the charge of a trained nurse. The Draft Convention does not require the provision of crèches, but they exist already in the following countries, and are becoming more general : Argentina, Chile, Denmark, France, Italy, Peru, Poland, Portugal, Rumania and the Serb-Croat-Slovene Kingdom.

Benefits.—We now come to the very important question of " benefits." These may be in cash, or medical services, or both.

Under the Draft Convention, all women employed in industry and commerce are eligible for " benefits," without regard to nationality or marital status.

Under national laws, restrictions are rare, but there are a few exceptions. In France, for instance, the provision of " benefits " is restricted to women of French nationality. In Australia the Commonwealth Act applies only to Australian women, or prospective settlers, and excludes those of non-European origin. (In the State Acts, on the other hand, there is no such distinction.) In Great Britain there is no distinction of nationality, but, as regards marital status, the married woman is entitled to a " second maternity benefit," in virtue of her husband's insurance. In Luxemburg, too, a distinction is made between the married and unmarried mother, in that it is within the power of insurance funds, should they so desire, to limit medical attendance at confinement to married women only.

The amount of the cash " benefit " varies considerably. It may either be paid in a lump sum, as in Great Britain and Australia, or, and this is far more common, it is paid in the form of an allowance to the mother during the period when she is unable to work. Occasionally, as in Germany and Japan, both an allowance and a lump sum are paid.

The Draft Convention names no definite sum for " maternity benefit," but requires that it shall be sufficient to provide for the " healthy maintenance " of mother and baby.

Under national laws, the amount of the " benefit " varies from half wages, as in Guatemala and Salvador, to full wages, as in Latvia, Poland and Portugal, the modern tendency being to make the " benefit " equal to full wages.

In addition to this, in several countries, including France, Germany and Switzerland, while the mother is nursing the baby herself she receives a small " nursing benefit," paid daily or weekly, during a period varying from twelve weeks to one year from the birth of the child.

As the object of the cash " benefits " is to enable the mother to have complete rest after her confinement, most national laws stipulate that she shall do no work while in receipt of such " benefits." The Draft Convention, however, makes no reference to this.

In several countries, namely, Germany, Austria, Hungary, Luxemburg, Norway, Japan, Bulgaria, Rumania, Poland, Latvia, Lithuania, Chile, Czecho-Slovakia and the Serb-Croat-Slovene Kingdom, where the mortality among mothers and babies is high, an additional grant for funeral expenses is included in the cash " benefits." This grant is usually assessed at twenty or thirty times the daily wage, except in Bulgaria, where it is fifty times the daily wage, and in Norway, Rumania and Chile, where it is paid in a lump sum.

Besides cash " benefits," the Draft Convention provides for the

attendance of a doctor or certified midwife, and in most countries where the maternity laws have been framed since 1919, we find this provision ; some national laws requiring, in addition, that drugs and medical appliances be supplied free. In many countries a woman, by forfeiting part of her cash " benefit," may be given free treatment and maintenance in a home or maternity hospital. In Norway a woman refusing this is liable to be deprived of her cash " benefit," but this seems to be the only country in which there is anything approaching compulsion in this matter. As a rule, the woman does not forfeit more than half of her cash " benefit " if she has persons dependent on her, the remainder being granted to them. In some countries, again, by forfeiting one-third of her cash " benefit " a woman may have attendance by nurses in her own home.

In Great Britain there is, strictly speaking, no " medical benefit," as the money " benefits " are used to defray the cost, the Act providing that the " maternity benefit " may be administered " in cash or otherwise." On the other hand, free medical advice is provided both before and after confinement, by means of ante-natal clinics and welfare centres.

In this connexion it may be noted that although in the laws of certain countries no provisions are made for the payment of " maternity benefits " in cash or otherwise, it does not necessarily follow that no such provisions exist. Relief may be afforded by local or municipal authorities, or, as in Canada, by Mothers' Pension Laws.

By the Draft Convention, the cost of " benefits " may be defrayed either by the State or by a system of insurance.

Insurance.—In most countries the cost is met by Sickness Insurance Funds, to which State, employer and employee each contribute. There are a few countries in which the burden is borne entirely by the State, namely, France, Australia and South Africa ; and a few, again, in which the employer is solely responsible, namely, Portugal, Peru, Guatemala and China.

In nearly all those countries in which benefits are paid for out of Insurance Funds, the beneficiary must have paid a definite number of contributions to the Fund during the year immediately preceding her confinement, before she is entitled to benefits. The amount that must be contributed varies considerably in each country, the shortest period of insurance before confinement being three months, and the longest one year. In Japan a woman who has been insured for at least 180 days before her confinement is entitled to a cash benefit, paid in a lump sum, and to medical attendance. If she has been insured for only half that period she may choose either the cash or medical benefit, but not both. Occasionally an uninsured wife may benefit by her husband's insurance, as in Norway, where she is entitled to cash benefit paid in a lump sum, and free medical attendance, if he has been insured for not less than ten months before the birth of the child.

It will be seen by this brief account of the laws affecting women in industry before and after childbirth that civilized States are doing their

best to cope with the unfortunate economic necessity of employing mothers with young and growing families. While, no doubt, this is very gratifying to the social conscience, one cannot help hoping that the time will come when it will be economically possible for all mothers to devote their lives to the care and up-bringing of their children.

Libel on the Dead.—With reference to the article on this subject in a previous number,[1] we have received from Professor Lassar of Hamburg a note on the German law. The broad rules of civil liability in damages are laid down in art. 823 of the Civil Code: "Any person who unlawfully causes injury (*verletzt*) whether designedly or negligently to the life, the body, the health, the freedom, the property, or to any other right of another person is bound to make good the damage. *The same obligation lies on anyone who has contravened a law for the protection of another person.*"[2]

It is under the paragraph italicized that the action for libel on the dead is competent. The "protecting law" (*Schutzgesetz*) is found in art. 189 of the German Penal Code (*Strafgesetzbuch*). This runs: "Anyone who injures the reputation of a deceased person by knowingly making or spreading a false statement of fact (*unwahre Tatsache*)[3] of such a character that if it had been made during the lifetime of the deceased it would have tended to bring him into contempt or to damage his reputation is liable to imprisonment for six months. If there are mitigating circumstances he may be condemned to a fine not exceeding 900 marks. The prosecution lies only at the instance of the parents, children or surviving spouse of the deceased. It appears that only one case of this kind has so far been decided by the *Reichsgericht*. This was the affair Dierig, decided on December 3, 1917. Unfortunately the case does not seem to have found its way into the official reports. The circumstances are too complicated to be narrated here. The Court held that a good cause of action had been stated, but in the result the action failed.

Italian Penal Code.—The new Penal Code prepared by the Minister of Justice but not yet enacted reflects, as is natural, the spirit and aims of *Fascismo*. It reintroduces capital punishment and is extremely drastic in its penalties for political offences. It does all that a penal code can do to protect the family. The Code makes short work of the teaching of Lombroso and his followers that society has no right to punish. A person who fails to denounce anyone who commits a political offence is liable to one year's imprisonment. Refusal to obey a public functionary may involve the same penalty. It is a crime to offend the State in the person of its representatives. Very noteworthy are the provisions which aim at repressing sexual immorality. Adultery and concubinage render offenders

[1] *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, p. 1.

[2] As to the character of such "protecting laws" see *Entscheidungen des Reichsgericht in Zivilsachen*, Bd. 51, S. 177, Bd. 59, S. 49 and 236, Bd. 63, S. 324, Bd. 70, S. 201, Bd. 79, S. 85.

[3] As to what is meant by an *unwahre Tatsache* see *Reichsgerichtstraf*, 22, 158. The statement must be made to a third person, *Reichsgerichtstraf*, 29, 40.

liable to three years' imprisonment. It is a crime for a married man to seduce a girl. Economic and political strikes, the boycott and the lock-out, are crimes. Other novel features are that usury is a crime, as is also failure to pay a debt if the debtor is clearly proved to have been in bad faith, *i.e.* to have incurred the debt with the intention of not paying it. A pickpocket is liable to ten years' imprisonment. For swearing in public or offending the symbols venerated by the Catholic religion the penalty is a fine of from 100 to 300 lire. Side by side with much that is Draconian there are provisions of a very modern character aiming at prevention of crime. We shall hope to give a fuller account of the Code when it becomes law.

Natural Law with Variable Content (Weltrecht).—Both in France and in Germany there has been in recent years a revival of interest in "natural law," but it is natural law with a difference. Bentham's characteristic remark on the old "natural lawyers" struck home. "They use this phrase (natural law) as if there were a code of natural law; they appeal to these laws, they cite them, they literally oppose them to the laws of the legislators, and they do not perceive that these natural laws are of their own invention."[1]

This criticism does not apply with so much force to the new school. Stammler, Kohler, Zitelmann and most recently Manigk[2] in Germany, Charmont, Saleilles, Demogue in France, are in varying degrees champions of natural law, but not of a natural law which is universal and immutable. The ideal law in a particular case depends on circumstances, such as the state of public opinion at the time, and it will not necessarily be the same in Tokio as in Paris. Charmont puts the new position very clearly: "Natural law is not incompatible with the law of evolution; it should not attempt 'to embody positive and definitive ideas in its assertions and conclusions.'"[3] To use Stammler's very expressive phrase, it has inevitably a "variable content" (*ein Naturrecht mit wechselnden Inhalt*).[4]

Some would go further and look for a world-law like the *naturalia jura quae apud omnes gentes peraeque observantur*. Dr. Jacques Stern, in a pamphlet which is the expansion of an address given in Tokio,[5] contemplates the possibility of the nations of the world agreeing to be governed as to most matters by a world-law based on natural law, while at the same time they retain each a kernel of local law. This, he says, would probably mean that the family law and the law of real property would remain local and would not be universalized. Dr. Stern thinks that if this is to come about, Japan will have an important *rôle* to play. She has shown a remarkable power of assimilating Western culture with-

[1] *Principes de la Législation*, Brussels ed. 1840, v. 1, p. 46.
[2] *Die Idee des Naturrechts*, 1926.
[3] Labbé, *Préface du Droit Romain de Cuq*, p. 13.
[4] Modern Legal Philosophy Series, VII, *Modern French Legal Philosophy*, p. 111.
[5] *Naturrecht und Weltrecht im Lichte der Rechtsentwicklung Japans und Chinas*, Berlin, Japaninstitut, 1927.

out losing her own individual character and is accordingly specially fitted to be an intermediary between the East and the West. He suggests that the words of Goethe may come true :

Orient und Okzident
Sind nicht mehr zu trennen.

It may be so, but there is still a good deal of point in " East is East, and West is West."

Sundry Japanese Laws.[1]—Dr. de Becker in this handbook has brought together a number of Japanese legislative enactments which are likely to be of interest to persons engaged in business with Japan or proposing to take up residence there.

The principal topic dealt with is that portion of the Japanese Land Law which deals with the granting of leases to aliens and the user of the premises by them. Further this book also contains the text of certain other enactments such as for instance the Business Profits Tax Law and the Stamp Duty Law. Those who are interested in these matters will find Dr. de Becker's little book of very great value.

Japanese Income Tax Law.[2]—This is a translation of the revised Japanese Income Tax Law (Shotoku Zeiho) which came into force on April, 1926, with an appendix containing the Regulations for the collection of the tax.

Some of the provisions of this Law are of considerable interest, *e.g.* those of Article 19 which exempts persons engaged in certain basic industries from taxation. Considerable ingenuity has also been displayed by the framers of the law in graduating the incidence of the tax.

[1] *Sundry Japanese Laws.* Translated by J. E. de Becker, LL.B., D.C.L. (Butterworth & Co., London, 1927.)

[2] *Japanese Income Tax Law.* Translated by J. E. de Becker, LL.B., D.C.L. (Butterworth & Co., London, 1926, n.p., pp. 48.)

NOTICES OF BOOKS.

SECOND CHAMBERS.[1]

ORIGINALLY published in 1910, this work has been revised, and in view of the Parliament Act of 1911 partly rewritten, in order that public opinion may be adequately guided in the consideration of current projects for the reconstitution of the House of Lords. A summary of the history and functions of the House and of its relations with the House of Commons is followed by chapters on the Second Chambers of the United States, Germany, Switzerland and France, also of those of Canada, Australia and South Africa. The book closes with two admirable chapters on the Parliament Act and its results, and on the various proposals of House of Lords reform. On this head the author has prudently refrained from any serious discussion of Lord Cave's sketch of reconstitution given to the House of Lords in last June ; a scheme which lacked detail and was obviously tentative could hardly be subjected to criticism with any satisfactory result.

A primary question in any discussion of the subject in hand is whether a Second Chamber is wanted at all ; and we get here the short answer supplied by history. The uni-cameral system has been tried once in England and once in France, in both cases in the course of a revolution, and in both discarded. Sir John Marriott might have referred also to the State legislatures of the United States. There too a Single Chamber was tried in Pennsylvania, Vermont and Georgia, with only the corrective of an Executive Council, but in each case abandoned. In five of the smaller States of Europe, with post-war constitutions, the Single Chamber system is under trial, with the corrective of initiative, referendum and similar devices. In all the great States of the world, however, including our democratically advanced Dominions, the bi-cameral system is firmly established on the teachings of history and consensus of public opinion.

In the study of foreign and colonial precedents we need to observe that many of the constitutions are federal, whereas ours and that of France are unitary. The distinction, however, applies more to the constitution than to the powers and functions of a Second Chamber. Under a federal system the States enjoy a large autonomy, and the national legislature, thus less liable to congestion, might presumably be

[1] *Second Chambers : an Inductive Study in Political Science.* By Sir John Marriott, M.P. New Edition. (Humphrey Milford, Oxford University Press, 1927. Pp. vi + 250, price 10*s.* 6*d.* net.)

credited with greater circumspection in the subjects and elaboration of their measures. But the fact remains that all the great States have recognized the need of a Second Chamber, and the necessity is consequently the more urgent in countries like ours, where the whole burden of legislation falls upon a single Parliament.

In regard to the reform of the House of Lords there are three main questions: (1) the powers of control and revision to be assigned, (2) the settlement of differences between the Houses, and (3) the constitution of the Chamber. As to the first two, much guidance may be obtained from the precedents set out in this book. They tend to show that the House of Lords is at present the weakest of all Second Chambers, and that some restoration of its powers is wanted. The lack of provision for the solution of deadlocks is the root of all our recent troubles, the unconstitutional swamping power and the Parliament Act of 1911. Sir John Marriott has thus wisely described in great particularity the methods of solving deadlocks adopted in the Constitutions of Australia and South Africa. For the reform of the constitution of the House of Lords the precedents give us less help: our hereditary peerage is now unique, and while it may seem an anomaly in a democracy, its conspicuous services in the past and its value as a school of statesmen cannot be lightly disregarded. It has indeed become unwieldy in size and its numbers must be reduced. If the hereditary principle is wholly or partly abandoned, we must see to it that the new body will be of equal or better quality than that which we displace.

A Second Chamber must always be more or less conservative in character. Its interference is more frequently needed when a "progressive" Government is in power. One of Lord Oxford's favourite arguments is that, when the Conservatives are in office, we live under Single Chamber rule. This is hardly true, because Conservative Bills get from the Lords much independent criticism, and are frequently amended against ministerial dictation; and if it were true, the same conditions would have prevailed in favour of Lord Oxford's own party if in 1911 the House of Lords had been packed under the swamping power.

A very valuable contribution to political history is given in the chapter recounting the circumstances in which the Parliament Bill was passed, and in particular the action which the King was constrained to take therein. During the session of 1910 King Edward had died and the Bill had been introduced in the House of Commons, followed by a secret conference between the leaders of the two parties which proved abortive, and a prorogation. Then followed the historic interview of Mr. Asquith and Lord Crewe with the new King. They came armed with a Cabinet memorandum, characterized by Sir John Marriott as a "loaded pistol." There was to be a dissolution, but only on the terms of the King's agreement then and there to a creation of peers if the Government came back with a majority, and if such a creation should be necessary. The Ministry

were " fully alive to the importance of keeping the name of the King out of the sphere of party and electoral controversy." The intention of this sentence has given rise to much surmise: as it stands, the observation seems entirely irrelevant. Here was one of the very few cases in which the King has to make a grave political decision in his own person; whatever that decision might be, it could not but bring the King into the sphere of controversy. The expression " electoral controversy " has suggested to many a sinister interpretation: it does not seem to relate to the ensuing general election, because the memorandum ends with the expression of an intention not to publish the King's decision " until the actual occasion should arise," though these latter words would seem to apply only if the decision were in favour of the Ministers. As the King's name could not in this matter be kept out of controversy, it may be held that the dignity of the Crown would have been enhanced, certainly if the decision had been postponed until the occasion arose and perhaps more if it had been adverse. With Sir John Marriott's description of the whole transaction as " a sordid story " few constitutional lawyers will disagree. Lord Crewe himself admitted that to him the " whole business " was " odious," a strange word to be applied to proceedings claimed by his leader to be altogether constitutional.

On very few points the author's statements are open to question. He says that the Lords passed the Trades Disputes Bill of 1906 under the belief that the Ministry had received a mandate for it from the electorate. It was passed in fact under coercion, not of the electorate at large, but of the Labour party alone; its worse provisions had been repudiated by Liberal leaders such as Mr. Haldane and the Attorney-General (Sir J. Lawson Walton). Again, he says that it was only the " swamping " power which averted war (presumably civil war) in 1832 and 1911. Serious commotion would probably have followed a second rejection of the Reform Bill in 1832. The situation was different in 1911, because the Parliament Bill was not urgent otherwise than as a " delivery of the goods " in a parliamentary deal, with which the electorate of Great Britain had little concern. One may doubt whether dogs would have barked furiously outside Palace Yard if it had been lost.

ALBERT GRAY.

CONTINENTAL CIVIL PROCEDURE.[1]

THIS latest (the penultimate) volume of the well-known " Continental Legal History Series," published under the auspices of the Association of American Law Schools, is one of the most important and interesting, possibly the most interesting, of the whole of this valuable series; and Professor Wigmore and his colleagues, editorial and contributory, are to be warmly congratulated on the near approach of the accomplishment of

[1] *A History of Continental Civil Procedure.* By Arthur Engelmann and others. Translated and edited by Robert Wyness Millar. (Boston (U.S.A.): Little, Brown, 1927.)

their long-sustained and successfully prosecuted task. Inasmuch as the volume in question brings the story of its subject-matter down to the present time, it has an immediate practical as well as an historical interest; and the editorial preface by the translator, Professor Wyness Millar, the synthetic sketch by the same hand of the general principles manifested in the story told by the book, the Introductions by Professors Holdsworth and Williston, and the Essay on the Roman and Germanic Elements in Continental Civil Procedure, by Professor Chiovenda, add to the value of the volume.

It is, perhaps, a little to be regretted, that the text of the work should be by different hands; for, unless the various contributions to a book like this are carefully co-ordinated, the parallels which they draw are apt to be in different planes, and thus to render difficult the work of comparison. Probably, however, this process was inevitable; owing to the fact that no single mind, however profound and learned, could be expected to embrace the whole of the subject. And if we seem at times, in reading the book, to be conscious of a rather drastic editing of the various works from which toll has been taken, we reflect that, after all, the originals can always be consulted, if doubt arises.

The foundation of the volume is the work *Der Civil-prozess, Geschichte und System* (Breslau, 1889–1901) of the late Arthur Engelmann, at his death in 1912 the Chief of the important *Oberlandesgericht* of Breslau. This author's great academic and judicial experience made him singularly qualified to undertake an exceptionally difficult task; and the thoroughness with which he fulfilled it is characteristic of the older and better school of German legal scholarship. The Senatspräsident is not content to accept the medieval German procedure as an ultimate fact, but traces it back through the Romano-Canon Law of the early Middle Ages to the classical Roman Law, and even to Republican sources. As he reaches more modern times, Herr Engelmann, not unmindful of the influence of that curious but persistent phantom, the Holy Roman Empire, includes in his survey the modern Germany, the former Austrian Empire, and even the history of feudal France before the consolidation of the monarchy under Louis XI; while the survey of Swedish procedural history (which touched the general West European stream through the reforming efforts of Gustavus Vasa in the sixteenth century and the spreading influence of the reorganized *Reichskammergericht*) is contributed by a distinguished Swedish ex-judge, Wilhelm Uppström, whose *Öfversigt af den Svenska Processens Historia* (Stockholm, 1884) brings the story of Swedish procedure down to the end of the nineteenth century. A final chapter is contributed by Dr. Thore Engströmer. The later history of French civil procedure is covered by extracts from Glasson (rather an out-of-date authority) and Lorenz von Stein, who, though of much the same epoch as Glasson, is important as foreshadowing the later developments of the school of Durkheim and Duguit. For later Austrian developments, resort is had to Schwartz's *Vierhundert Jahre deutscher Civil-Gesetzgebung*;

while the account of modern Italian procedure is derived from Salvioli's *Storia del diritto italiano*, from Rossi's *Forme del procedimento civile*, and, for the later stages, from Professor Chiovenda's *Principii di diritto processuale civile* (Naples, 1923).

Evidently this substantial volume is something in the nature of a mosaic ; but the fitting together has been well done, and the result is a clear, if somewhat bizarre story. The unifying influence has been the fact that the whole of the extracts from the original works drawn upon have been translated by the same hand, that of Professor Millar, who has exercised (doubtless with the permission of the various authors) a somewhat free liberty of recension. His translations have, however, been revised by experts speaking the tongue of the original works.

It would, of course, be impossible, within the space devoted to a review of even such an important book as this, to attempt to reconstruct, or even to summarize, the history of Continental Civil Procedure. The book itself runs to over 900 pages of close print ; and the small-print notes, many of them of great length, contain valuable information. The reviewer may content himself with noticing a few points in the interesting Appendix by Professor Chiovenda, of Rome, entitled *Romanesimo e germanesimo nel processo civile* (originally, we believe, delivered as a lecture in 1902), and relating them to the material displayed in the work under notice ; concluding by a suggestion as to the historical value of an attempt, on such lines, to trace the evolutionary factors in procedural development.

Professor Chiovenda is, naturally, faced by the fundamental fact that the civilization of Western Europe, as expressed in its legal systems, is a blend of Roman and what used to be called ' Teutonic ' elements. While the direct sway of Roman Law in Western Europe was broken by the downfall of the Western Empire (for the Pragmatic Sanction of Justinian was a mere empty form, except in the narrow Exarchate won by the triumphs of Belisarius and Narses), its indirect effect was admittedly great. Not only were the pre-Justinianean law books of the Roman Empire—the *Edictum Theoderici* (by the Ostrogoths), the *Breviarium Alaricianum* (by the Visigoths), and the *Lex Romana Burgundionum* (by the Burgundians)—' made over ' by the conquerors for the use of their provincial subjects ; but the growing influence of the Church tended, at least in spiritual matters, to spread the influence of Roman Law even among the barbarian settlers themselves (*ecclesia vivit lege Romanâ*). Further, the victorious invasion and settlement of Northern Italy by the Lombards in the sixth century, though making a mock of Justinian's Pragmatic Sanction, yet, in the procedural system which they developed, though they retained much ' Germanic ' law, largely adopted Roman principles for their judicial organization and procedure. These events constituted, as Professor Chiovenda rightly claims, a true and first ' reception ' of the Roman Law, not inferior in importance to the later results of the labours of the ' Four Doctors,'

Placentinus, Azo, and Accursius at Bologna, of the anonymous *Pseudo-Constitutions* of the tenth century, and the *Brachylogus* of the eleventh; while the fact that the increasing Romanization of the law of Germany proper led to the enthronement of Roman Law as the *gemeines-recht* of the thirteenth and fourteenth centuries, is also material in this connexion. Even distant England, which is not, of course, dealt with in the book under review, felt the influence of the Roman Law; though to what extent is still a matter of dispute. Still more distant Sweden did not, as we have seen, escape it. Scotland, as we know, took it over wholesale in certain departments of her law. Only in the extreme north, in Norway and Iceland, was its influence unfelt, at any rate in secular matters.

On the other hand, it would be a psychological absurdity to suppose that the Roman Law, in the centuries succeeding the invasions, had it entirely its own way. The mute confession of the scribes who drew up the *Lex Salica* that they could only guess at the meaning of some of the barbarous phrases which they recorded, and the equally eloquent and more amusing determination of the barbarian to treat the inkhorn and the parchment of the Roman scribe, not as the means of recording a contract, but as the pledges (*wadia*) without which no engagement was complete,[1] are alike suggestive. The law of the Later Empire was a law fit only for people in a somewhat advanced stage of civilization, far removed from that of the shepherd warriors who had overthrown that Empire, and to whom even agriculture was a newly acquired art. It is impossible to believe that the highly individualized law of Rome, administered autocratically by an all-powerful State, would commend itself to those turbulent warriors, whose real allegiance was given to their clan or kindred, and who recognized the authority of their temporary leader only as a *heretoch* or host-commander, having no power to interfere with tribal custom except so far as was necessary to enforce military discipline. Nor does this inference rest on psychological grounds alone. Alongside the *Edictum Theoderici* and the *Lex Romana Burgundionum* were recorded the *Lex Salica*, the *Lex Ribuaria*, and the *Liber Papiensis* of the Lombard Kings; as, in later days, the *Sachsenspiegel* and the *Schwabenspiegel* in Germany and the *Très Ancien Coutumier* and the *Coutumes de Beauvais* in France appeared alongside of, and in opposition to, the *Pseudo-Constitutions* and the *Brachylogus*. In Saxony, indeed, the movement in favour of the native law was so powerful as to threaten serious opposition to the Romanizing influence of the new Imperial Courts and procedure in the fifteenth century.

But, though we may admit that there is abundant evidence of both Roman and 'German' influence in Continental Civil Procedure, it does not appear necessarily to follow that certain features in that procedure can be definitely assigned to each source, or that it is possible to establish,

[1] See this interesting practice explained in Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde*, pp. 104–7, 262–5.

as it were, a balance-sheet in favour of one or the other. Still less does it appear to be possible to label any particular feature of a given system of procedure as 'Roman' or 'German,' wherever it may be found. For example, it may, no doubt, be said that it is characteristic of the late Roman procedure to allow a plaintiff to continue his action in the absence of a defendant who, after sufficient warning, has failed to put in an appearance; while, as is well known, the old *Leges Barbarorum* seem to regard it as impossible for the Court to proceed in the absence of the defendant, even when he has been outlawed. Or again, while the principle which regards the administration of justice as wholly the function of the judge (the so-called 'inquisition principle') is likewise characteristic of late Roman Law, it is, no doubt, true that the procedure of the old Frankish and Swabian Courts was practically that of a duel between the parties, with the judge or judges as umpire.

But is not this to compare different stages of development, and then to assume that the differences have a racial origin? Is it not equally true to reverse the picture, and to point out that the Twelve Tables of Rome at least suggest that, when they were drawn up, legal proceedings without the presence of the defendant would have been unthinkable (*Si in jus vocat, ito. Ni it, antestamino. Si calvitur pedemve struit, manum endo jacito*); while, on the other hand, by the modern German *Zivilprozessordnung of* 1877 (republished in 1898), there is no difficulty in proceeding in the absence of a contumacious defendant? Or again, that whereas, no doubt, 'inquisitorial' procedure is more characteristic of Roman than of 'German' ideas, yet probably the high-water mark of inquisitorial procedure (at least as far as civil and secular matters are concerned) was reached in the Prussian Code of 1793.

Thus, while we may fully admit, with Professor Chiovenda, that there have, obviously, been occasions in modern European history on which the influence of one national system upon another has been notorious—for example, in the years following the French Revolution, when the French Code of Civil Procedure was actually in force in many parts of Germany—yet it seems by no means clear that there is anything peculiarly national or racial in such systems. To take, for example, the French Code itself. Doubtless it was, in form, an emanation of that 'droit naturel' of which J. J. Rousseau was a conspicuous exponent; yet, is it not in reality but a modernized form of the 'Code Louis' of 1667, drawn up by Pussort under the inspiration of Colbert? And is the Code Louis again, as a scientific exposition of the *Coutume de Paris*, 'Roman' or 'German'?

Surely the historical problems of procedure are not soluble by racial or national tests. We may, no doubt, remark on the conspicuous fact that, while Western Europe was suffering from the delays and ineptitudes of the Romano-Canonical procedure (the *Solennis Ordo*), so vividly set forth by John of Bologna in 1281, England was rapidly developing a short and effective common law procedure beside which the eighteen steps of

the *Summa Notariæ* appear to be a deliberate plot to cause delay and expense. But was not this because of the circumstances of the Norman Conquest, which had enabled the officials of a strong centralized monarchy to deprive the feudal and local tribunals of much of their business by setting themselves up as rivals of superior efficiency, while the local potentates of Germany were too strong to be suppressed and not strong enough to enforce order and law in their own domains? And when the 'Clementina Sæpe' of 1306 effected a sweeping reform in the older system of Romano-Canon law, is it surprising that, while the old English common-law courts refused to adopt it in the place of their own machinery, yet the newly established tribunal of the Chancellor should have found it useful as a guide, if not as a model?[1] In other words, is not environment, rather than inheritance, the true cause of the appearance of any particular procedural characteristic at any particular time or place?

And is there not, also, a special danger in the method pursued by the Continental jurists? As Professor Chiovenda wisely observes: "In science, patriotism readily fosters error" (p. 903). Exactly so. And Professor Chiovenda is rightly critical of the national bias of Eichorn and Ludwig Maurer, who, by way of defiance of Napoleon's legions, began to raise the banner of historic 'Germanism,' thereby provoking the memorable protest of Savigny, himself a rather remarkable blend of patriotism and scholarship. But what shall we say when, a few pages later, Professor Chiovenda himself, after suggesting that 'Romano-Canonical' and 'Lombard' procedure would be more rightly described as 'Italian,' because of the spirit of liberality which they breathe, urges that "the basis of the French procedure, as of the Italian and the German, is the Romano-Canonical or medieval Italian procedure"?

Perhaps it is on the philosophical side that the book before us is deficient. Its real value consists in the immense mass of historical detail which it contains, and the amount of information about modern Continental procedure which it gives us. In this mass of facts there are constant materials for curiosity and speculation. What English lawyer, for example, would have suspected that the very modern 'procedure under Order XIV' had been anticipated by five centuries in the Romano-Canonical procedure of the *præceptum de solvendo*? Or that the still more modern 'summons for directions' was only a revival of the ancient 'proof judgment' of the old customary tribunals? It is examples such as these which make all national theories of origins very doubtful.

In truth, if a philosophic explanation of procedural differences is to be sought, it seems more likely to be found in the realm of genetics than of political history. If, for example, instead of the early history of the

[1] The indebtedness of Chancery to the 'Sæpe' has not yet been made clear. But at least the following passage from the 'Sæpe' is suggestive: *Interrogabit (judex) etiam partes sive ad earum instantiam sive ex officio ubicunque hoc æquitas suadebit.*

Roman procedure which it contains, the book before us had included the far more detailed picture of primitive justice which we get, for example, in the *Njala Saga*, by way of preface to the account given by Dr. Uppström of the medieval Swedish procedure (with which it is closely connected), an English lawyer, knowing something of the history of his own system, might really have got a tolerably clear idea of the biological tendencies of procedural systems in Western Europe. Incidentally, for example, he might have learnt something of the origin of the rule of the Common Law that lawsuits are unassignable; for he would have realized that the primitive instinct of litigants is all the other way, and that, in Iceland at any rate, at the time of the sagas, the transfer of 'mere claims for damages' was an everyday affair, with disastrous results to law and order, of which the English Common Law judges of the thirteenth century were, no doubt, fully aware. Also he might have seen actually at work a system so rudimentary that it fails to distinguish between questions of law and questions of fact; while the historical connexion (if any) between the Icelandic *gridr*, the Swedish *nämnd*, and the English jury would have presented itself as a fascinating problem.

The picture of primitive legal procedure drawn by the *Njala Saga* (of which, after the labours of Gudbrand Vigfusson, there seems to be no reason to doubt the genuineness) brings out with convincing force the truth, that legal procedure has its origin in the gradual pacification of the still older procedure of the blood-feud, itself rendered systematic by the incipient spirit of order without which no community can start on the path of civilization. The unconscious effort of the community is to substitute peaceful methods for the violence of the feud, without departing too openly from the procedure of the feud itself, rendered popular by long tradition. Such methods are, naturally, distinguished by that 'orality' which is claimed as a special mark of 'Germanism,' partly because it is desired to retain as much as possible the atmosphere of 'self-help,' and partly because the art of writing is still unknown. The acquisition of the art of writing naturally leads to the gradual adoption of 'records,' to avoid disputes as to the precise steps taken in a long and complicated process; and this practice gradually spreads (especially if assisted by outside influences) till it leads to written pleadings and judgments. Meanwhile, the evolution of the centralized State, with its *manus militaris* and skilled officials, has been gradually depriving the parties of that control over the proceedings which prevented the primitive tribunal coercing contumacious defendants otherwise than by the cumbersome and ineffective process of outlawry, and which retained in use the barbaric methods of the trial by battle and the 'distress infinite.' Unless, again, a wholesome spirit of independence in the community keeps the growing power of the State in check, this power, especially if aided by ecclesiastical casuistry and the belief in the supreme virtue of the confession as the best possible kind of 'evidence' other than the ordeal, may very well lead, as it did lead in Continental criminal procedure,

to the triumph of the 'inquisition principle' and the universal prevalence of 'the question.' From that danger the English Common Law escaped by its apparently lucky discovery of the jury-system; though the records of the Star Chamber and, it is to be feared, even of the Court of Chancery, should be a warning against any undue claim of 'national' superiority.

Finally, in the history of 'formalism' the moral is the same. Formalism arises inevitably from the early history of legal procedure. Unless the parties in the fictitious warfare can be made to observe the 'rigour of the game,' the whole difficult effort comes to an end. The litigant is no more bound to pardon a slip of the tongue than he is bound to overlook a slip of the sword or axe. If his adversary makes a mistake, so much the worse for him. The intellectual effort necessary to distinguish between 'principle' and accident, between form and essence, is wholly beyond the power of the barbarian. Again let the champion of English 'fair play' remember the comparatively modern development of 'special pleading' before he claims any superiority over his Continental neighbours. Truly the path which leads to impartial, uncorrupt, substantial, and speedy justice, in matters in which human passions are strongly aroused, is no easy one. Slowly and by painful steps is the Pisgah height attained; and, when it is reached, it still reveals but a distant view of the Promised Land.

EDWARD JENKS.

LAW IN THE MAKING.[1]

THIS is an admirable and delightful book. Many law-books—even good ones—are *biblia a-biblia* for the lover of letters. They are useful to have at hand to refer to, but we would no more read them for pleasure than *Whitaker's Almanack*. *Law in the Making* is a book to read and to read again. It is full of sound learning, but learning presented with grace and point and even on occasion with wit. Among its many merits it has one which we are in private duty bound to praise in this *Journal*, namely, that it is full of apt references to modern French and German writers.

The author modestly says that he would have liked to dedicate the volume to the memory of Sir Paul Vinogradoff, but he is "deterred by the unworthiness of the tribute." His readers will be far from agreeing with him.

The title of the book is probably as good a one as could be found, but a little explanation is necessary. It is not a formal treatise on jurisprudence and does not set out to cover many of the topics commonly dealt with in textbooks on that subject. It does not, for example, discuss the various kinds of legal rights, the nature of ownership, of possession, and of liability, civil and penal, the various modes of acquisition and so forth. It is concerned solely with the different modes by

[1] *Law in the Making*, by Carleton Kemp Allen. (Oxford: The Clarendon Press. Pp. xxiii + 388. Price 21*s*. net.)

which rules come to be part of the law, and more particularly part of the law of England.

The use of the term "sources of law" has often conduced to confusion rather than to clarity, but if we are to retain it—and it is hard to find a substitute—then the subject of this book is the "material" sources of the law of England. Such a discussion is obviously a natural way to approach the study of any system of law, and Justinian's *Institutes* in their bald and summary fashion tackle it almost at the outset.

Mr. Allen's book forms in fact an excellent introduction to the study of English law in general without possessing any of the repulsive characteristics of works written for examination purposes. But this by no means implies that lawyers of any age and rank will not find profit and pleasure in it.

After a criticism of Austin's *Theory of Law* as the will of a sovereign—why is Austin still inevitable?—Mr. Allen takes up in order the nature, origin and application of custom, the nature, history, and authority of precedents in English law—a particularly valuable part of the work—the conception of Equity and its place in English law, the place of legislation among sources of law and the character and alarming growth of "subordinate" legislation.

Mr. Allen is very much alive to those dangers incident to modern bureaucracy to which attention has lately been drawn in public addresses by the Lord Chief Justice. In particular, he objects strongly to entrusting quasi-judicial powers to Government Departments whose decisions are not subject to appeal to the ordinary Courts, and he says roundly as to remedies against the Crown: "In this matter we are much worse off than our French neighbours, who in the remarkable jurisprudence of the *Conseil d'État* possess not only a body of enlightened and consistent principles, but a stout defence against bureaucratic oppression" (p. 331). This is sadly true, but we must not go to the extreme of following M. Duguit and his disciples, who regard governments with as little respect as if they were bands of pirates who had got the crew under hatches and were for the moment in control of the ship.

Time brings strange revenges. It used to be one of the boasts of English lawyers that we had no administrative law.

This is not the only part of the work in which the author shows a refreshing freedom from the complacence of many writers on law which, though it was amusing in Blackstone, is tiresome in lesser writers. He has nothing of the rosy optimism of the Real Property Commissioners who reported in 1829, "We have the satisfaction to report that the law of Real Property seems to us to require very few essential alterations," a contention to which Maitland half a century later gave such a shattering rejoinder.[1]

On the contrary, though it is not Mr. Allen's special business to suggest reforms, there are many places in which he indicates pretty

[1] *Collected Papers*, i. 193.

plainly his dissent from the view that all is well with the law. For example, he says of equity: "It is doubtful whether the general spirit and utility of equity in English law have gained by being detached in a separate jurisdiction. English equity has developed a rigour and artificiality of its own which have often resulted in the denial rather than the furtherance of natural justice" (p. 236). Here and upon some other matters a Scots lawyer may be pardoned for suggesting that the author might have found instructive illustrations across the Border. Scotland has got on so far without separate courts of equity and has not been a penny the worse. Mr. Allen states with due caution that in the Roman law a *lex* might be abrogated by desuetude (p. 44), whereas in England "age cannot wither an Act of Parliament" (p. 270). And he gives some capital instances of the survival of old statutes no longer enforced. It would have been appropriate to notice that in Scotland an Act of the old Scots Parliament may be abrogated by desuetude, and we are sure Mr. Allen, if he had thought of it, would have liked to quote Stair (i. 12): "In this, we differ from the English, whose statutes of Parliament, of whatsoever antiquity, remain ever in force till they be repealed: which occasions to them many sad debates (public and private) upon old forgotten statutes."

In his account of the part played by judicial precedents in continental systems and particularly in French law, Mr. Allen rightly draws attention to the ever-increasing importance in that system of judicial decisions. As he says, the administrative law is judge-made law, and he might have spoken more strongly than he does. In point of fact, every branch of French law is largely judge-made. Take the law of torts. Does anyone think it is to be found in the half-dozen vague articles of the Civil Code? Or take the law of life assurance. The Courts have fought their way to it, if we may say so, over the prostrate body of the Code. Most English writers, though not Mr. Allen, fail to understand what Codes are meant for. The Codes lay down merely the general principles and the rest is left to the Courts. Every article in the French Civil Code which has any vitality in it has by this time become encrusted with cases, and if we want to know what the actual working law is, the Code will carry us only a very little way. In fact a vast amount of French law has grown up, as most English law does, "internally by the secretion of new rules which are the product of the judicial interpretation of the law," to use a phrase of Salmond's. The Codes are interpreted in France with a freedom which would astonish English lawyers. A French lawyer is greatly puzzled when he hears the common English view that codes make for rigidity, and that our rule of binding precedents tends to elasticity. To him the truth seems to be just the opposite.

The only bit of Mr. Allen's book about which we are disposed to quarrel is where he joins issue with Salmond about the distinction between "legal" sources and "historical" sources (p. 150). Whether we talk about some authorities being "binding" and others merely "persuasive," or of "legal" sources and "historical" sources is no great matter. But

we cannot agree with Mr. Allen that the distinction between the two things is " artificial " or that it " soon breaks down when applied to the actual business of adjudication." Salmond is surely quite justified in drawing the distinction between a " binding " precedent on the one hand and a passage from the Digest or from a foreign jurist on the other. When judges speak, as they sometimes do, of such a passage being " authoritative " or " decisive," they are merely using popular language. Mr. Allen, of course, does not really mean that an English Court is *bound* to follow an opinion, say, of Pothier. When Pothier says, for example, that a contract is formed by the consent of parties *pour former entre elles un engagement*, and, in so saying, implies that no " consideration " is necessary, his law would not be accepted in England by the meanest Court that breathes. When, on the other hand, he says that error as to the person does not annul a contract unless it appears that the " consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make," that is a statement which Fry J. regards as so reasonable that he lays it down as a rule of English law.[1]

To say, as Salmond does, that our law " knows nothing of Pothier or of Tribonian or of the Urban Praetor " is of course in a certain sense not true. It is sometimes, though by no means always, useful to have Pothier or the Urban Praetor on our side in an argument. But if we read the passage in Salmond which Mr. Allen cites we see that Salmond not only does not deny this proposition but affirms it, though perhaps with something less than his usual clearness. Apart from this little matter, Mr. Allen's two chapters on Precedents are of remarkable interest and value. They abound in illuminating illustrations ranging from the earliest Year Books down to the Law Reports of last year.

When the book goes to a second edition the statement on p. 33 about the inalienability of parental rights will need modification in view of s. 5 of the Adoption of Children Act, 1926 ; and on p. 263 there will need to be a reference to the Indian and Colonial Divorce Jurisdiction Act, 1926. We hope that at the same time Mr. Allen will give a bibliography. F. P. W.

PRIZE LAW DURING THE WORLD WAR.

Two books have recently been published on Prize Law during the Great War, one written by a distinguished American lawyer, Professor Garner,[2] and the other by an English lawyer, Dr. Colombos.[3] Each book covers

[1] *Smith* v. *Wheatcroft*, [1878] 9 Ch. D. 223.

[2] *Prize Law during the World War : A Study of the Jurisprudence of the Prize Courts*, 1914–1924. By J. W. Garner, Ph.D., LL.D. (London : Macmillan & Co., Ltd., pp. xlviii + 712, price 25*s*. net.)

[3] *A Treatise on the Law of Prize*. By C. John Colombos, LL.D. The Grotius Society Publications, No. 5. (London : Sweet & Maxwell, Ltd., pp. xxx + 384, price 15*s*. net.)

much the same ground. In both are surveyed the constitution and procedure of the Prize Courts, which exercised jurisdiction in the countries of the belligerent nations, and the law which they applied. As Professor Garner points out in the Introduction to his book, those Prize Courts delivered not less than 1,500 reported decisions, besides a large number of other decisions which were never reported.

> No war of the past [he states] ever produced so extensive an output of prize jurisprudence. The Prize Courts dealt with every question of international law that had been the subject of adjudication by the Prize Courts during former wars, and in many cases old questions were presented under new and sometimes novel forms. Likewise, the Prize Courts were called upon to decide many new questions that had never before been the subject of adjudication, and consequently concerning which there were no exact precedents for the guidance of the Courts.

Both of the learned authors have studied and analysed the decisions which have been reported or collected, and they have presented a concise statement of the law relating to prize, taking as the basis of their exposition the law as applied and developed in the British Prize Courts, and pointing out the differences between the decisions of the British Courts and those of the Courts of other nations.

In 1914 the rules relating to prize law were remarkably difficult for a British lawyer to find. The well-known textbooks on international law devoted comparatively little space to the subject. The practitioners in the British Prize Courts had mainly to rely on two volumes of Reports of Prize Cases collected and summarized by Mr. Roscoe, the Admiralty Registrar of the Supreme Court of Justice in London. They contained all the reported cases decided in England from 1745 to 1859 which were considered of value. They were mostly decisions of Lord Stowell, whose decisions form the basis of British prize law. When he was appointed Judge of the High Court of Admiralty in 1798, Great Britain had been at war with France for about five years, and the war lasted till 1801. As Mr. Roscoe wrote in the Preface of his work:

> There was then little definite law to guide either Bench or Bar, there was no code of British prize law, and but few judicial decisions were to be found recorded, and those, for the most part, but imperfectly reported.

To this source of knowledge were added the contributions which the American Courts and learned lawyers, such as Mr. Justice Story, had made to the law relating to the capture of property at sea, and in particular to the doctrine of continuous voyage as applied to contraband.

Between 1914 and 1918 there was built up on those foundations a vast amount of judicial decisions. Owing to the circumstances of the War little was known in one country about the decisions given in the Prize Courts of other countries. Since 1918 much labour has been spent in collecting these decisions, but the difficult task remained of embodying them in a convenient form. That is the task which Professor Garner and Dr. Colombos have performed, and each has produced in a few

hundred pages a work which will be of great value to those who desire to understand the modern law and practice relating to prize. Professor Pearce Higgins, in an instructive Introductory chapter to the treatise of Dr. Colombos, writes that:

> the fact that Prize Courts in many countries are bound by the orders and legislative enactments of the authority under which they sit, and are consequently not at liberty to apply rules of international law where these conflict with the municipal instructions, has led Dr. Colombos to conclude his work with a chapter on an International Prize Court. . . . On general principles, (continues Professor Pearce Higgins), it must appear that an international tribunal is the only one which can with independence and impartiality apply the rules of international law, and the arguments by which Dr. Colombos supports his plea for the establishment of an International Prize Court are weighty. He (Dr. Colombos) is of opinion that the record of cases in the Prize Courts of the belligerents reveals the fact that the number of open questions is now not so great as to render an agreement on the main rules of international law in time of war impossible.

The British Prize Courts were strictly judicial tribunals, which applied what they conceived to be the rules of international law, entirely unfettered by executive orders. The French Prize Court was an administrative tribunal consisting of a Conseiller d'État, as President, and high officials of the ministries of Marine and Foreign Affairs; and the law which it administered partly consisted of rules laid down in national laws, decrees, and official instructions issued to French naval officers. The Italian Prize Court comprised both judicial and administrative members, and the law which it administered was partly contained in official instructions. In Germany the Prize Courts consisted of a judge and four members, representing naval and shipping interests, and the law which they administered consisted mainly of the rules laid down in an imperial ordinance. Professor Garner writes:

> When one reads the decisions of the continental Prize Courts, and particularly those of Germany, which emphasize that, first of all, it is the national law which they apply, one might conclude that there is a fundamental difference between the function and obligation of English and continental prize tribunals. In reality, however, the difference is largely theoretical and leads to no important difference of results; it is in reality a difference of point of view and of emphasis rather than of practice. The British Prize Courts, in fact, while proclaiming that they administer only international law, admit that they apply it only when it has received the assent of the British Government given through its appropriate organs; that is, they regard the rules of international law as deriving their force and validity as from the authority of the State in which they sit, and they acknowledge their duty to apply Acts of Parliament, if not Orders of the Crown in Council, which are admittedly contrary to international law, although they will of course always endeavour to so construe municipal legislation in such a way as to make it accord with international law. This was emphatically asserted by the Judicial Committee of the Privy Council in the case of the *Zamora*, where it was said that it could not, of course, be

disputed that a Prize Court, like any other Court, is bound by the legislative acts of its own sovereign State ; and that a British Prize Court would certainly be bound by Acts of the Legislature, and, if they were inconsistent with the law of nations, the Prize Court in giving effect to them would no longer be administering international law but municipal law.

In the case of the *Zamora*, however, it was laid down that British Prize Courts are not bound by executive Orders in Council if they are contrary to international law, except where their effect is merely to mitigate the rights of the Crown in favour of the enemy or neutral. The Orders in Council issued in retaliation against the infringements of international law by Germany authorized measures against neutral ships the purpose of which was to prevent any goods from entering or leaving Germany. At the beginning of the War the English Prize Court and the Judicial Committee of the Privy Council emphasized the doctrine that the Declaration of Paris of 1856 was " a recognized and acknowledged part of the law of nations." The retaliatory Orders in Council infringed the rule laid down in the Declaration, and, while assisting to cripple Germany, unquestionably caused great inconvenience and loss to neutrals. It was, however, decided in the Privy Council that any Order of the Executive issued as a retaliatory order was conclusive as to the facts recited in the Order as showing that cause for reprisals existed, and the only question for the Prize Court to decide was whether the measures of retaliation were other than commensurate with the prior wrong done by the enemy, and whether they inflicted on neutrals inconvenience greater than was reasonable under all the circumstances ; and that it was material to the latter question to consider the frequency and enormity of the original wrongs, for the more gross and universal those wrongs were, the more were all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involved. The argument was rejected that there was an absolute right in neutral trade to proceed without interference or restriction subject to the application of the rules as to contraband traffic, unneutral service, and blockade. In a subsequent prize case, in which the validity of a retaliatory Order in Council was challenged without success by neutrals, the reasoning on which the Prize Court proceeded was that :

> when war is carried on by sea, neutrals are naturally more affected in relation to their trade than they are by land warfare ; and belligerents who have had supremacy or superiority upon the waters, have insisted progressively and effectively upon their right to bring pressure upon their enemies in proportion to their maritime power. The legitimate object of a belligerent is to destroy or cripple the enemy's commerce. The result to neutrals is interference with their trade, but because that is inevitable, they must put up with it and they have no right to complain, or to claim compensation.

The judgment was affirmed by the Privy Council, which emphasized the principle that without the rights which a belligerent may enforce against neutral subjects, " maritime war would be frustrated and the appeal

to the arbitrament of arms be made of no effect." The contention that when a belligerent retaliates upon his enemy, neutral shipowners, whose ships are seized, must be compensated for the loss caused to them, was declared to be inconsistent with the theory on which the right of retaliation is exercised. Retaliation against an enemy who violates or is declared by his adversary to violate rules of international law, is definitely sanctioned by practice and legal authority.

Opinions [says Professor Garner] will naturally differ as to the merits of the question ; but it can at least be said that a recognition of the legal right of the belligerents to override the protection established by international law in behalf of neutrals, puts it within the power of belligerents to reduce that protection to a nullity. If such a right is to be retained, manifestly its exercise should be subject to the ultimate control of an international Prize Court, for the reason that as the jurisprudence now stands, national Prize Courts consider themselves bound by the recitals of justification set forth in the orders of their governments proclaiming the institution of retaliatory measures. The effect, therefore, is to make the belligerent the final judge of the necessity and legality of such measures.

Similarly Dr. Colombos points out that :

the right of retaliation enables belligerents to cast aside for the time being all the accepted rules governing neutral trade. . . . The basis on which the legality of retaliatory orders rests before the Prize Courts, namely, that they should not impose on neutrals more inconvenience than is reasonably necessary, is illusory, and does not afford any protection. Prize Courts are bound by the recitals in the Order enforcing reprisals, and these recitals are certain to allege a case sufficient to justify any action they enjoin. The great danger of retaliation is that it is a political, not a legal measure, and that its justification depends on considerations foreign to a Court of Justice. In the result, the neutral is left without any remedy.

The rules of international law are apt to melt in the heat of the conflict which brings them into operation.

Questions relating to contraband of war particularly affected neutrals and were the subject of hundreds of decisions. At The Hague Peace Conference, 1907, an agreement was reached as to what articles should be deemed absolute contraband, and the classification was reproduced in the Declaration of London, 1909, and was completed by lists of articles declared to be conditionally contraband and articles which were free. But the rules therein prescribed were soon set aside by the belligerents ; and by a series of doctrines or presumptions of law or of fact the result was generally reached that most goods carried by sea were contraband if they were goods which the neutral claimant could not or would not prove would not ultimately have reached an enemy country if they had been delivered at the neutral port of the ship's destination. In the early months of the War the British Government created a special body, known as the Contraband Committee, to examine and report upon claims for the release of detained cargoes or claims for permission to carry

particular cargoes to their neutral port of destination. This committee dealt with a large number of claims, with the result that goods, which otherwise might have been seized as prize, were not seized, and goods which were seized were released, and were not brought before the Prize Court for adjudication. But when application was made to the Prize Court for condemnation of goods as contraband, there were few loopholes by which they could escape. Germany was in need, as indeed most of the belligerent countries were in need, of foodstuffs and commodities required by a nation in arms to enable its population to fight or to equip its armies and navies with what they required. Most of the necessaries for maintaining life and those required for destroying life were under Government control. No logical distinction could be drawn, or was drawn, between the armed forces and the civilian population, or between articles for military or civilian use. It became immaterial to consider, for example, whether a consignment of salted herrings was for the use of the civil population, because, if it was, there would probably be more bread and meat available for the use of the armed forces. Any belligerent was at liberty to put any articles it chose on the list of articles which it intended to treat as contraband. The lists grew rapidly in length as the War proceeded, until perhaps it would have been more simple to make out a list of what was not contraband. Ultimately there was no practical distinction between articles conditionally contraband and those absolutely contraband. In effect the belligerents prohibited neutrals from trading with the enemy by the carriage of goods by sea. If the particular goods in question before the Prize Court were in the contraband list, the only question to be considered was whether their ultimate destination was an enemy country. The intention or knowledge of the shippers as to the real ultimate destination of the goods was immaterial. The question was where would the goods have gone after delivery from the ship. They were condemned if the inference of fact which the Court drew was that their ultimate destination was an enemy country. All enemy ports were regarded as bases of military supplies. If the goods were raw materials which were being imported into a neutral country to be manufactured there and afterwards to be exported to an enemy country for military use, they were held to be confiscable ; but if they were going to an enemy country to be manufactured there for export to and consumption in a neutral country, they were liable to be condemned, " because a Court of Prize would not embark upon inquiries as to what would or might ultimately become of contraband captured on its way to enemy territory ; and captors would be unduly puzzled or hampered in their action if they had to consider what the future history of the goods might be." The burden was put on the neutral claimant of proving that he was the owner of the goods, and that they were not destined to an enemy territory. It was not sufficient to establish that they were consigned to a neutral country. The claimant had to show that if the goods had reached the neutral country they would not have been sent to an enemy

country. A hostile destination was readily presumed by the Court, and generally the presumption or guess was in fact accurate. Neutral claimants rarely came to England to give evidence in the Prize Court in support of their claims. Travelling, especially by sea, was difficult and dangerous, and neutrals were no doubt fully engaged at home in their own occupations. Their evidence was usually given by affidavit or declaration, to which were exhibited documents relating to the transaction.

Business men in neutral countries sometimes did not understand the rules relating to disclosure of documents in the possession of themselves or their agents, or, if they did, they were often unwilling, and sometimes were forbidden by their own laws, to disclose all relevant documents. They suffered accordingly for non-compliance with the rules relating to disclosure of documents. Lists were compiled of persons, who in neutral countries were, or were believed to be, enemy agents or agents of the enemy Government. A neutral claimant had little or no chance of successfully challenging the accuracy of the list. Consignments which were shown to be on their way to persons on the list were usually presumed to be destined to the enemy territory.

Mr. Colombos writes, and with justification, with reference to the law of contraband, that :

> the question as it presents itself is either to abolish the theory of contraband altogether, and leave unfettered the carriage of all goods by neutrals to belligerents, or else to allow belligerents the right of forbidding neutrals from supplying the enemy with what enables him better to sustain or pursue the War.

It is a question on which opinions will be likely to differ. The interests of nations differ according to geographical and economic differences or they vary with circumstances, and what might be advantageous to them when they are neutral might be detrimental to their interests as belligerents. The question, however, may have to be considered in connexion with the larger and more vital and pressing question of disarmament.

C. R. Dunlop.

PARLIAMENTARY REFORM IN BELGIUM.[1]

This study of various schemes of political reform which have been proposed lately in Belgium contains much to interest English readers. Its author, now a professor of the University of Brussels, has had practical experience of politics as a Senator and as a member of the *Conseil Colonial*.

For Belgium the post-war period was one of enormous difficulty and strain. It is estimated that for a time one-third of the population depended on public assistance. Belgium had to rebuild 2,000 km. of

[1] *La Réforme de l'État en Belgique*, par H. Speyer. (Bruxelles : Bruyland, rue de la Régence 67 ; Paris : Librairie Générale de Droit, rue Soufflot 20. Pp. 146.)

railways, to restore devastated areas, to provide compensation for war losses, and for these and other purposes to borrow very largely. The fall in the exchange reduced to poverty many of the well-to-do *rentiers*. That Belgium has now got into comparatively smooth water, even at the cost of much suffering to individuals, says much for the sagacity of Belgian statesmen and for the talents and energy of a brave people. It is not surprising, however, that a period of such storm and stress should have evoked many suggestions for constitutional changes.

M. Speyer has no faith in revolutionary methods. He holds that the only practicable government for Belgium is parliamentary government based on universal suffrage, and that, whatever faults democracy may have, it is still preferable to any alternative form of government. He does not believe either in dictators or in government by "experts." As is well known, the Belgian constitution of 1831 was modelled closely upon our own, but in some important respects its evolution has been different. In particular, the constitutional power of the sovereign is greater. The King of the Belgians commands in person, as we all know, his army in the field, and he also presides frequently at meetings of the Cabinet, as English kings used to do.

M. Speyer does not agree with the view that proportional representation leads to weak governments. It has been in operation in Belgium since 1899 and, in spite of the fact that there are three political parties, it has not prevented the formation of stable governments. M. Speyer points out with force that our system does not secure stable governments, for we had four dissolutions in less than six years between December 1918 and October 1924. The system employed in Belgium, known as the "d'Hondt" system, is pretty complicated. The candidates are chosen in each constituency by the party caucuses, which vary greatly in size and in the degree of influence exercised over them by the committee. They correspond roughly to the American "primaries." Their power in Belgium is very great, because they decide not only who shall be on the party ticket but also the order in which the names shall be printed, and under the "d'Hondt" system the candidates first named on the voting paper are almost certain to get the seats allotted to their party. A good deal has been written on the theory of *la représentation des intérêts* and one suggestion for reform, which has received a certain amount of support, is to substitute for the present representation of the citizens indiscriminately a parliament composed of representatives of various classes or interests in the country.

M. Speyer considers, on the other hand, that the most hopeful line of advance is by reforming the procedure of Parliament. He suggests among other things that Bills should be more carefully drafted, that the Chambers should in certain cases hear in committee the views of experts or representatives of interests and that the reading of long written statements in the House should be stopped. There is much in this study which deserves our attention. F. P. W.

EUROPEAN DIPLOMACY.[1]

This is an excellent book and should be read by everybody who is interested in the Great War and in international politics. It must be realized, however, that the somewhat sensational title of the book is perhaps capable of being misunderstood. There are not many startling revelations, and nobody must expect a dramatic narrative of events. Dr. Gooch has, very wisely, here made no attempt at all to write a diplomatic history, which would have required many more pages than the light and eminently readable volume which he has put forth. The result is a very scholarly work, which is not a bibliography nor yet an analysis, but is a masterly sketch of the outstanding points of interest contained in practically every book which can be called an original document, bearing on the World War or on the period immediately before and after it.

The amount of reading and of applied knowledge and judgment which Dr. Gooch's book represents is simply stupendous. Scores of volumes, many of them of very great size, and some of them of a considerable degree of abstruseness, have been carefully and critically read, and then, in a light and incisive paragraph, their message is given, with a word of comment, for the ordinary reader.

Dr. Gooch carries his load of learning with consummate ease. A book which deals successively with so many titles sounds somewhat an arid thing, even repellent. Quite the contrary is the actual result. Dr. Gooch's book is simply enthralling, and it is almost impossible to lay it down. It begins with an account of the chief books which have appeared in Germany since the opening of the World War in regard to diplomatic history. Naturally, for there were few honest books of revelation written during the War, most of the titles dealt with are those of post-War books. Chapter I, Germany, puts in the first place the famous Kautsky documents, which were the immediate result of the opening of the archives of the German Foreign Office. The Kautsky volumes had to be prepared in great haste, but are still indispensable to students of the outbreak of the War. Then follows a brief account of the less well-known *Bayerische Dokumente*, about which Dr. Gooch has just one point to make—the garbling by Kurt Eisner of the Bavaria despatch from Berlin of July 18, 1914, regarding the forthcoming Austrian ultimatum to Serbia. This is typical of Dr. Gooch's method. To analyse every book which he mentions would be impossible for the writer and tedious for the reader. Instead of essaying the impossible, Dr. Gooch has followed the plan, which only a man possessing wide and deep knowledge of contemporary history could accomplish, of taking out the one thing that most matters from the work which

[1] *Recent Revelations of European Diplomacy.* By G. B. Gooch, D.Litt., F.B.A. (London: Longmans, Green & Co. Pp. vi + 218. Price 7*s.* 6*d.* net.)

he is discussing, and presenting that, with a comment, to the reader. With regard to the monumental series called *Die Grosse Politik der europäischen Kabinette*, this method is, of course, impossible; for the many volumes of the *Grosse Politik* contain one or more documents on nearly every subject of interest in the diplomatic history of the last forty years. Accordingly Dr. Gooch selects one point as a specimen, the "Kruger Dispatch" of the Kaiser, and elucidates it from another book published by one of the editors of the *Grosse Politik*. From a personal perusal of the whole chapter on Germany there stand out clearly pictures of the Kaiser, of Bülow, and of Bethmann-Hollweg. On the question of war-guilt, Dr. Gooch finds no evidence of a pre-arranged plan of the German Government to conquer the world; but this does not mean that the Germans, by following better ways, could not have prevented the War. Two things emerge which at once fix at any rate a certain amount of responsibility and which their own documents and commentators admit: one, the German Government deliberately and repeatedly refused an offer of alliance from England in 1898 and the two following years; two, they persisted in a policy of building a big fleet, although all except Tirpitz seem to have realized that this was the one question over which they could feel assured that England would be ready to fight.

The method of Dr. Gooch in regard to the books produced in other countries follows the same lines as in his fifty-nine pages on Germany. With regard to Austria, he has a luminous paragraph on the work of Pribram, by Wickham Steed, of Margutti, and a particularly long and welcome account of the Memoirs of Field-Marshal Conrad, a book which has never been sufficiently noticed in this country. Many other Austrian works are referred to and their essential point given. The fascinating chapter on Russia puts the reader *au courant* chiefly with documents which have come out as the result of the Bolshevik revolution. This chapter is less satisfying than those on Germany and Austria. The amazing Russian court and bureaucracy, and the tremendous revelations of the post-Revolution period cannot be dealt with fully in eighteen pages. Next follow the *Near East* (chiefly books in French), France (where many interesting books have come out, but few documents), Belgium, Italy and Spain (three in one chapter), Great Britain (whose *Documents on the Origin of the War* began coming out under the editorship of Drs. Gooch and Temperley *after* this book was written), and the United States (for which some important volumes which have recently appeared were not available when Dr. Gooch wrote). After the German and Austrian chapters, which occupy ninety-six pages together, the treatment of other countries seems a little small. Anyhow, the German and Austrian chapters mark a new departure in historical writing, and will always rank as a classical example.

R. B. Mowat.

THE TRIAL OF CRIMINAL CASES IN INDIA.[1]

This work is described on its title-page as "a discussion of the Indian Code of Criminal Procedure," the author's purpose being "to show how the different parts of the Code fit into one another by examining them and explaining those parts and their interrelations." His method is to describe in clear and untechnical language, but with marginal references to the appropriate provisions, the various stages in the investigation and trial of criminal cases by the police and courts of all grades in India. This description avoids repetitions, is accurate and exhaustive and is supplemented by sound advice based on Mr. Sabonadière's experience as a magistrate and sessions judge regarding the practical considerations governing the use of a judicial discretion. The book should be a useful introduction to the subject for the student who requires a general and consecutive account of the law or the magistrate who has to master the routine of his duties. For either will find it more convenient to have the substance of the various sections arranged with reference to the order in which they will usually be applied in practice than to search for them under the various headings of the Code and to satisfy himself that none has been overlooked. There is further, when necessary, a statement of the effect of the case law on particular points, and these statements, so far as they go and so far as it has been possible to test them, are generally sound. They are, however, necessarily expressed shortly and without reference to the different terms in which the law has been laid down in different provinces. It is not in fact within the scheme of the work to give quotations from or references to reports. The Indian advocate seldom misses an arguable point of procedure and for the actual trial of cases most Courts will require a more elaborate treatise in which these omissions are supplied.

F. O.

THE ADMINISTRATION OF JUSTICE OF MUSLIM LAW.[2]

This little work of less than 150 pages reviews the systems of courts and procedure in the principal States, past and present, of the Muslim world. It is prefaced by an Introduction giving an abstract of various Muslim conceptions of the State. It is clear that, whatever may have been the ideas of the State in pre-Muslim Arabia, where indeed it is probable that there was no governmental unit higher than the tribe or the city, the first Khalifa upon the death of the Prophet, Abu Bakr, upon taking up that office with some reluctance, expressed himself as feeling rather bound by responsibilities to which the voice of his fellows

[1] *The Trial of Criminal Cases in India.* By A. Sabonadière. (Calcutta: Thacker, Spink & Co. Pp. viii + 692.)

[2] *The Administration of Justice of Muslim Law.* By Al-Haj Mahomed Ullah Ibn S. Jung, M.A., LL.D. (Allahabad: Mahomed Ullah S. Jung. Pp. xvi + 132.)

had called him than elated at the idea of being the Chief of Islam. In his first address to the Faithful there occur these passages: "If I go on the right path, help me; if I go astray, put me right; the weaker among you is stronger in my eyes. I shall see, by the grace of God, that he secures his rights, and the aggressive among you is the weaker in my eyes. I shall take away what is not his by right. . . . So long as I follow God and the Apostle, follow me; and when I deviate in the minutest details from the law of God and the Prophet, then you need obey me no more." Dr. Mahomed Ullah justly holds that herein is the acknowledgment of a social contract between the Khalifa and the People. And herein he considers is the true spirit of Islamic administration. Unfortunately Islam did not remain long free from internecine feuds, and within fifty years of the death of the Prophet the principal power in Islam had passed to Mussulmans of the group who had been bitter enemies of the Prophet at the commencement of his career as a religious preacher and reformer, and had acceded to Islam only when it was becoming victorious in the greater part of Arabia. And these rulers, the Umayyads of Damascus, and their successors in power the Abassids of Baghdad, undoubtedly established a system of monarchy as opposed to the commonwealth of the early days of Islam. The clear-cut ideas which the modern world has of democracy can hardly have been current in Western Asia eleven centuries ago, and early Islam is better described as a commonwealth than as a democracy. The Khalifa should be chosen with the approval of the Faithful, or subject to their approval, rather than directly by them. In practice, however, if not in theory, Islam became pretty well an absolute monarchy under the Umayyad and Abassid rulers. And a result of this was to check the progress and development of Mohammedan Law. There is very little actual law in the Koran. But there are many passages from which legal principles can be deduced. Then there were the decisions of the Prophet, and his actions from which a legal rule might be deduced, these two things constituting the Traditions. But even with these there were wide gaps which those administering Justice had to fill up somehow. Then came in the doctrine of Ijma, or general consent, by which the Prophet himself undoubtedly had been guided when, after the flight to Medina Sharif, he became invested with ruling powers in that town. He did not wish to change any law or custom not repugnant to the principles of Islam, and he certainly consulted the people of Medina on what their laws and customs were when he came to administer justice there. Finally, there is the principle of Qiyas, or analogy, applied in its fullest extent by the great Sunni jurist Abu Hanifa. The Prophet himself had approved of the application of the judge's sense of justice when there was no other discoverable rule to follow. So far Mohammedan Law had shown great possibilities of evolutionary adaptability to changing circumstances. But absolutism, whether of a person or of an oligarchy, is a great drag on evolutionary change, and the result is that Mussulman jurisprudence,

after an early period of hopeful progress, became changed into a mass of traditionalism and thin-spun argument.

Dr. Mahomed Ullah traces the administration of justice in Arabia, Syria, Spain, Iraq, Egypt and North Africa, the Ottoman Empire and Persia. And, true to his country, he goes at rather greater length into the history of it in India under the early Mussulman invaders, the Moguls, the East India Company and the Crown. In Mussulman countries the general system of Courts, which administered law of all kinds, was the local Court, the Provincial Court, and the Court of the Sultan, Emperor or other Ruler. Of course there were variations at various times and in various places. At least there was ample opportunity for appeal to, or revision by, higher authority. But practice, probably, did not always follow theory too closely. A notable thing is the small number of crimes or offences which are actually specified and to which definite punishments are allotted. In Dr. Mahomed Ullah's view even the harshest punishments—for instance, stoning for sexual offences—could in the discretion of the Court or the ruler be toned down in practice, for he holds that the Koran merely lays down fundamental principles. The Mussulman law of evidence is strange to Westerners. If the defendant does not admit a claim, the plaintiff must prove it. The defendant may swear that the claim is false, and may in most circumstances insist that the plaintiff too shall be sworn. But "evidence repugnant to the claim cannot be submitted at all." So, if the plaintiff alleges that on the first day of Ramzan, 1342 H., the defendant personally borrowed a thousand rupees in cash from him at Baghdad, the defendant will not be allowed to adduce evidence to show that he himself on that date was at Basra, and could not possibly have borrowed money at Baghdad.

The book is of great interest to those who desire to know how justice is and has been administered under a system of law having a source utterly different from that of the law of any European country. It is much to be regretted that very little care appears to have been devoted to reading the proofs of it before it went to press.

A. Sabonadière.

INTERNATIONAL PUBLIC LAW AND INTERNATIONAL ORGANIZATION.[1]

The second edition of this work is very welcome. The first edition, published in 1912, had won for itself an assured position in the vast literature of this subject. The new edition is thoroughly revised and contains much new matter. International public law was subjected during the War to severe strains and the pre-war books on the subject have now a very antiquated appearance. The author tells us that one

[1] *The Essentials of International Public Law and Organization.* By Amos S. Hershey, Professor of Political Science and International Law in Indiana University. (New York: The Macmillan Co., pp. 784. Price 15*s.* net.)

reason for the delay in bringing out a second edition was his "temporarily weakened faith in the potency of international law and the lack of convincing evidence of the stability of the New World order slowly emerging from the wreck of old Europe. Not until the dawn of Geneva and Locarno did the writer acquire sufficient resolution to undertake the task of this revision. He is now persuaded not only that the New World order has secured a fairly firm footing, but that, mainly due to the agency of the League of Nations, international law is passing through the greatest period in the history of its development. This is especially the case with respect to the pacific settlement of international disputes and the continued progress of international co-operation, legislation (through the treaty-making power), and organization."

In its present form this is an extremely useful and valuable book, Though addressed primarily to university teachers and students, its appeal is by no means limited to them. The politician, the journalist, and indeed everyone who tries to follow the course of international affairs will find his profit in it.

In a new chapter on "The Paris Treaties and After" the author gives a sober and impartial account of the Treaty of Versailles and the supplementary treaties and of the diplomatic history down to 1925.

Another new chapter deals with "Amicable Means of Settlement of International Differences" and includes a description of the Permanent Court of International Justice.

The peculiar merit of Dr. Hershey's book is the excellence of the bibliographical notes on every topic. These give references not only to books but to the mass of periodical literature in English, French and German. The reader who consults the book upon any point is at once put upon the right lines of investigation. The preparation of the book must have cost enormous labour.

F. P. W.

STATE SUCCESSION.[1]

Professor Sack's book deals with one of the most unsettled questions in international law. In the last twenty years it has been contended by many writers that the very term "state succession" is a misnomer and one of the numerous examples of the confusion caused by the introduction into the law of nations of conceptions taken from private jurisprudence; that the successor state steps, in law, into rights only, and not into duties; that the problems arising out of changes of territorial sovereignty are regulated solely by the will of the succeeding sovereign; and, in short, that the change of sovereignty creates a legal vacuum which international law is unable to fill. On the other hand, it has been widely observed that the view propounded by those writers runs counter

[1] A.-N. Sack, *Les effets des transformations des États sur leurs dettes publiques et autres obligations financières.* Traité juridique et financier. Avec une Préface de N. Politis. Recueil Sirey. Paris. 1927. Pp. xvi + 608.

to the legal principle of continuity and respect for acquired rights ; that it is contrary to justice and equity ; that it disregards the necessities of economic stability ; and, last but not least, that it cannot be squared with the practice of states in the last hundred years. What is clear is that there is no generally recognized rule of international law on the subject, and that the practice of municipal courts varies according to countries and circumstances. No wonder, therefore, that the international lawyer approaches with eager interest a book of the size of Professor Sack's treatise. Its scope is imposing, and Hall's disparaging comment on writers on state succession as largely copying one another hardly applies to it. All that has hitherto been written on state succession in regard to the public debt could not, if added together, make up the stately sum of Professor Sack's pages. This is only the first volume of the author's contribution to the question of state succession. But even when completed, the work will have dealt with only one aspect of the question, leaving intact succession in rights, obligations connected with delicts and quasi-delicts, political rights and duties arising out of treaties, etc.

The present volume is divided into three parts. The first is an exposition of the juridical nature of state succession in debts. After discussing the requirements of a valid public debt, the author establishes as a general proposition that such debts constitute an obligation of private (not public) law, that they are guaranteed by the state as a whole, and that, as such, they are a charge upon the entire territory of the debtor state. He then discusses the different theories of state succession. There follows a lucid exposition of certain special classes of indebtedness. Here belong debts of non-sovereign states with a distinct political existence like state-members of a federal state or vassal states, as well as the important category of the so-called " obnoxious debts " (*dettes odieuses*), that is to say debts contracted against the interests of the whole or of a part of the population (for instance, loans the proceeds of which are used for the purpose of oppressing a national or racial minority). The war debt, as obnoxious to the new state, is also included within this group. In the second part of the book the author discusses various questions connected with the application of the principle of succession, whereas the third part is devoted to a detailed examination of the modes of apportioning and distributing the debt. These last two parts are based almost exclusively on the consideration of the practice of states as evidenced in treaties, arbitration awards and relevant international documents. In this respect the book is a mine of information, and will prove a most useful instrument of research for those for whom the question of state succession still remains a problem.

For a problem it remains, notwithstanding Professor Sack's meritorious treatise. The elaboration of the legal theory of state succession in regard to the public debt is obviously inadequate. It is a matter of regret that the enormous industry which helped the author in collecting most valuable

material has not been supplemented by a correspondingly searching investigation into the fundamental aspects of the problem. In a few sentences supported by two citations—an unusual economy of space in this so well documentated work—the author dismisses the problem as a question of international law. Only states, he says, are subjects of international law; the latter cannot therefore protect the rights of private persons in their capacity as creditors. It seems to have quite escaped the learned author that the number of publicists who would now be prepared to subscribe to this statement in its extreme form is not great. Certainly, states only are the organs of international legislation and members of the family of nations, but that does not mean that individuals cannot possess international rights. In fact, the *vindicatio in libertatem* of the individual as a subject of international rights—to use an expression of Professor Anzilotti, the President of the Permanent Court of International Justice—has become an important element in the post-war movement towards restating the bases of international law. And the Institute of International Law appointed at its last meeting a committee to report on the whole question. But also under the old doctrine it is difficult to follow the very concise argument of the author. For does not international law prescribe the granting of definite rights to individuals through the agency of municipal legislation? The rights of aliens or of diplomatic envoys are a case in point. On the other hand, the author denies that the principle of state succession in debts belongs to the domain of private law. Where then *does* it belong? The author's answer is: It is a right *sui generis* based on "*droit financiel*" and "*droit public général*," whatever that may be. This does not appear to be a very satisfactory solution. In this connexion it would have been an advantage to devote more than a passing reference to the meaning of the *vexata quæstio* of acquired rights. Finally, one might have wished for a fuller elaboration of the author's main thesis, namely, that the public debt is a charge upon the entire territory of the debtor state.

We need not say that the above remarks are in no way derogatory to the value of this scholarly and encyclopædic work. No student of international law engaged upon the study of the question of state succession will be able to afford to ignore this treatise, which is the most comprehensive on the subject.

It is not intended to criticize minor points. But perhaps attention should be drawn to the section dealing with debts of unsuccessful revolutionary governments (pp. 17–21). To say that all debts contracted by such governments are personal debts not binding upon the state as such, seems too sweeping a statement. Clearly, a distinction ought to be drawn between debts incurred for the purpose of discharging normal governmental duties and those incurred with the view of maintaining the revolutionary government in power. The award of the American-Mexican General Claims Commission of March 31, 1926,[1] is instructive on this point.

[1] Printed in *The American Journal of International Law*, xxi. (1927), p. 161.

The author promises us a series of indexes in the second volume, and we shall in due course be grateful for that. But seeing that the second volume might not appear for some time, Professor Sack would have earned our gratitude had he treated us to something in the nature of a provisional Index.

H. LAUTERPACHT.

HISTORIC TRIALS.[1]

THIS work has appeared after Sir John Macdonell's death, and consists of lectures delivered on various occasions. They have been revised and edited by Dr. R. W. Lee, who has also had assistance from Mr. Lawson of Merton College. The work of editing has been done with restraint and with care. All the lectures are well, though not too heavily, referenced, and there is an interesting introduction or preface written by Lord Shaw of Dunfermline.

The trials which are dealt with are properly called "historic," not simply because they were noteworthy, memorable and famous in the annals of the past, but because they were really political trials and not decided by strict justice or the rules of the best jurisprudence. The reading of them gives a vivid impression of the badness of courts when given over to politics. The subject-matter of all these trials is of very great interest, and readers are assured of pleasant and perfectly expert guidance from Sir John Macdonell. His style of writing is singularly easy, and his explanations are entirely free from any of the aridity which laymen, perhaps wrongly, are apt to expect in the works of lawyers.

The series of trials described in this book range from the fourth century B.C. to the seventeenth century A.D. The first trial described is that of Socrates. It took place at a time when there was "a feverish desire to preserve the old Hellenic life." It was a period of tension and reaction among a people who were as a rule, and on the whole, moderate and tolerant. Against this background the author has reconstructed the trial of Socrates and considered carefully in what respects it resembled an English trial.

This method gives to the book one of its most interesting qualities. Everywhere comparison is made with the well-known factors of English law and judicial practice, so that the reader at once is put in possession of the essentials of the case and sees it as it really was. This method gives a pleasing freshness to the subject. The trials cease to be old forgotten things, and become living transactions of human beings whose views can be understood and whose ideas of law can be appreciated. Socrates could not have been condemned by a process of law such as is followed to-day. On the other hand, Sir John Macdonell holds, he was

[1] *Historic Trials.* By Sir John Macdonell, K.C.B. (Oxford, at the Clarendon Press. Pp. xvi + 234. Price 10s.)

clearly a disruptive force in society. The judges knew this and acted on it. They did not, however, subject him to torture as would have been done in the Middle Ages and even in the late seventeenth century.

After Socrates come the trials of the Templars. In this lecture there is a great deal of research and much information on the mediæval point of view. This appreciation of the contemporary point of view is strong in all the lectures. Even in regard to the trial of Joan of Arc, Sir John Macdonell is able to make the reader feel that the judges did not act altogether without, at any rate, intelligible excuses for themselves.

The lecture on the life and trial of Giordano Bruno is a very fine piece of work, and restores the life of that wonderful period of the Counter-Reformation in a way that recalls *John Inglesant.* The trial of Queen Mary of Scotland is portrayed in all its shocking aspects—no rules of evidence, no witnesses, the tribunal determined from the first to find a verdict of guilt. This lecture should be read in conjunction with the recently published work on *King James's Secret.* After Mary comes Galileo, who was treated better than the Scottish Queen; and Servetus in whose trial Calvin does not figure at all well. His trial inspires Sir John Macdonell to say that when all is said and done the way in which justice is meted out and the sensitiveness of men to its principles is the only sure test of civilization.

Katharine of Aragon, Sir Walter Raleigh and two rather more general essays—trials for witchcraft and *Les Grands Jours d'Auvergne*—conclude a fascinating volume.

R. B. MOWAT.

FRENCH INDUSTRIAL LAW.[1]

THE learned author of this treatise dealing with the principles of French Industrial Law is to be congratulated on the skill with which he has compressed the essential portions of a difficult subject within the limits of a small handbook of some 300 pages.

The appearance of this work is particularly welcome at the present moment when Industrial Law throughout Europe is in a fluid state and it has become a task of the very greatest difficulty to keep abreast of the constant flood of new legislation.

Professor Scelle writes primarily for French Law Students, but this does not in any way impair the utility of his work to English readers who may desire to gain acquaintance with the subject. In fact the excellent arrangement and the clarity and simplicity of the text render it all the more valuable for this purpose.

H. C. G.

[1] *Précis Élémentaire de Législation Industrielle.* Par G. Scelle, Professeur à la Faculté de Droit de l'Université de Dijon. (Recueil Sirey Paris, 1927.)

SCHOOLS FOR NOTARIES IN ITALY[1]

THE early history of notaries public in France has been dealt with by Blancard and other writers, but it has hitherto been difficult to trace the rise and development of the profession in Italy without a great deal of trouble. Signor Anselmi's little work supplies a real want, though he confines himself to the early schools for notaries which existed in Northern and Central Italy during the Middle Ages. The first of these was founded at Bologna in 1228, and perhaps the most famous of its teachers was Rolandino Passegeri the author of the "Summa Artis Notarie."

H. C. G.

EFFECT OF THE WAR ON THE ITALIAN LAW OF OBLIGATIONS.[2]

THE effect of war and the atmosphere of war on contractual relationships is a topic which has now receded into the background; but it is as well that we should not forget the deep impression which the events of 1914–19 and the succeeding years have made on the development of the law of contract in all civilized communities. The two features which stand out most prominently in the growth of the law during the war and the post-war period are in the first place the formulation of new doctrines of the frustration of contracts by supervening impossibility and secondly the chaos created by legislation of an emergency character, which has tended to displace the functions of courts of justice in favour of administrative procedure, and to substitute more or less arbitrary rules for well-established principles of law. Professor Ricca-Barberis has placed comparative lawyers under a great obligation by collecting in the volume under review a series of monographs published by him at different times, dealing with the effect of war on the Italian law of obligations. His aim is to show that the influence of hostilities on the growth of law has for the most part been deplorable, owing to the fact that motives of expediency have been permitted to supersede ideals of justice. Of particular interest to English readers are his studies of the Italian Rent Restriction legislation, and of the application of the doctrine of *force majeure* to circumstances arising out of war and post-war conditions. The Italian nation is, however, not the only one to suffer from ill-considered emergency legislation, and from the effects of "ein gräussiges Rechtspratikum." Lord Hewart has on more than one occasion called attention to similar phenomena in our own country.

[1] *Le Scuole di Notariato in Italia*, by Anselmo Anselmi, Notario Viterbo, 1926, pp. 35.

[2] *Sul Diritto della Guerra e del Dopoguerra* (Studi di legislazione e di giurisprudenza), Mario Ricca-Barberis: Torino (Fratelli Bocca), 1926, pp. 362.

Professor Ricca-Barberis's book is undoubtedly a valuable contribution to the discussion of a wide-spread problem, and as such we heartily commend it.

H. C. G.

We have to acknowledge :

The Law of Carriage by Railway in Great Britain and Ireland. By L. R. Lipsett and T. J. D. Atkinson. (London: Jordan: Pitman.) Pp. xxiv + 930. Price 50*s.* net.

The Neutrality of the Netherlands during the World War. By Amry Vandenbosch. (Michigan: Wm. B. Erdmans Publishing Co.) Pp. 349. Price $4.00.

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THE ENGLISH PROPERTY LEGISLATION OF 1922–6.

[*Contributed by* R. R. A. Walker, Esq., B.A., LL.B.]

II

The changes introduced by the property legislation of 1922–6 form an attempt to simplify and consolidate the land law and to cheapen dealings in land. The scheme of the Acts was indicated in an earlier paper in this *Journal*,[1] and an attempt was made to give an outline of their place in the history of the development of this branch of English law. The general principles of the new legislation were to a large extent already part of the practical land law, being either introduced by the nineteenth-century statutes which it consolidates, or being conveyancing devices in general use amongst lawyers. The most important of the radical reforms is the simplification of the basis of landholding. Copyholding and customary tenures are abolished by the Law of Property Act, 1922, and the tenure of every parcel of land in England is, subject to a doubtful and quite unimportant exception, now free and common soccage.

The existence of the earlier statutes which are now consolidated probably made it desirable that the new legislation should be drafted in its present form, but it is not one which can be said to simplify the task of the commentator. The six main Acts are largely interdependent and in any detailed account of the provisions of one of them it is difficult to avoid frequent references to the others, though it is proposed to do so as far as is possible in this paper. We should not be without judicial sanction if we referred to the Acts as a legislative jungle,[2] and it is said that even harsher words have been spoken within the purlieus of Lincoln's Inn. But it must be remembered that the enactments cover a large field and consolidate and amend the oldest and most intricate branch of English law. The Law of Property Amendment Act of 1926 has supplied several omissions and clarified one or two ambiguities in the main Acts. Some tolerant judicial decisions and some ingenious conveyancing devices connected with the problems raised by the wide scope of

[1] Vol. x, pt. i, p. 1.

[2] Re *Earl of Stamford and Warrington*, [1927] 2 Ch., 217, 220.

ss. 1 and 3 of the Settled Land Act have also helped to ensure a more or less peaceful childhood for the new legislation. The time has not yet come for anything like a final pronouncement on the success or failure of the venture, but we should probably be safe in saying that our successors will agree that the move made by the present generation was in the right direction and, considering our limitations, eminently to be commended.

The Law of Property Act, 1925.—The Law of Property Act, 1925,[1] which replaces amongst other statutes the Conveyancing Acts of 1881 to 1911 and the Vendor and Purchaser Act, 1874, is a miscellaneous enactment which discourages the epitomizer. S. 1 reduces legal estates to two, the fee-simple absolute in possession and the term of years absolute, and places on the same footing certain charges, an easement over land for an estate equivalent to a fee-simple or a term of years, a rent-charge in possession either perpetual or for a term of years, a charge by way of legal mortgage, land tax and other charges on land not created by an instrument and rights of entry in respect of a term of years or annexed to a rent-charge. All other interests, such as entails, life interests, executory limitations, springing and shifting uses and powers of appointment over land, take effect in equity only. These equitable interests are overreached by a conveyance to a purchaser under the Settled Land Act, or an order of the Court, or by trustees for sale or by mortgagees and personal representatives exercising their paramount powers (s. 2) ; and it is possible to appoint trustees for sale for the purpose of overreaching already existing equitable interests except those protected by deposit of documents relating to the legal estate affected and certain other specified interests which cannot be adequately represented in terms of money. The rights of the owner of the equitable interest are transferred to the proceeds of sale, which is protected by the provisions restricting their payment to less than two persons or a trust corporation as Settled Land Act trustees or trustees for sale (s. 27). Instruments relating to interests and powers which will be overreached should not be included in the abstract of title (s. 10). A conveyance of a beneficial legal estate to an infant operates as an agreement to execute a settlement (s. 19), but the parties to a conveyance are until the contrary is proved presumed to be of full age (s. 15). A married infant can give a valid receipt for income (s. 21). The committee of a lunatic now

[1] For an annotated edition of this Act the reader is referred to Wolstenholme and Cherry's *Conveyancing Statutes*, 11th ed., vol. i, pp. 138–561, and Carson's *Real Property Statutes*, 3rd ed., pp. 598–853.

conveys in the lunatic's name in all cases and a lunatic trustee for sale must be discharged before the legal estate concerned is dealt with (s. 22). A trust for sale either express or implied is from the point of view of a purchaser subsisting until the land is actually conveyed to or by the direction of the persons interested in the proceeds of sale (s. 23). A trust for sale, including a trust either to sell or to retain, carries an implied power to postpone the sale indefinitely unless expressly excluded (s. 25). In carrying out a trust for sale trustees are to give effect to the wishes of the majority in value of the persons of full age interested in the proceeds of sale, but a purchaser need not inquire whether such wishes are complied with (s. 26). Trustees for sale have the powers of management conferred on tenants for life and trustees of a settlement under the Settled Land Act (s. 28), and these powers may be delegated to any adult beneficiary other than a mere annuitant (s. 29).

Land held or expressed to be conveyed in undivided shares in possession vests in trustees for sale and effect is given to the beneficial interests by transferring them to the proceeds of sale (ss. 34, 42 (6) and schedule i, part iv). A legal estate vested in joint tenants beneficially is similarly impressed with a trust for sale (s. 36). A husband and wife are for the purpose of acquiring interests in property to be treated as two persons (s. 37).

S. 40 replaces part of s. 4 of the Statute of Frauds (1677), amending it so as to give effect to the construction that has been placed on the wording of the older Act, but not altering the substance. Purchasers are enabled (s. 42) to refuse a title made with the concurrence of persons entitled to an equitable interest if title can be made under a trust for sale or under the Law of Property or Settled Land Acts, but they will not always be well advised to insist on their strict rights in this respect. The getting in of legal estates at the cost of a purchaser cannot be stipulated for by contract (s. 42), nor can the cancellation of the registration of registered equitable interests which are overreached by the conveyance (s. 43). The statutory period for the commencement of title is reduced from forty years to thirty, and ss. 44 and 45 provide certain statutory conditions of sale which apply unless excluded by stipulation and which make it possible for a vendor with a good marketable title to enter into an open contract without fear of being put to undue expense in showing title. Stipulations that a purchaser shall employ the vendor's solicitor are void (s. 48). Vendor and purchaser summonses are made to apply to any interest in land and where the Court refuses

specific performance it may order the repayment of the deposit (s. 49) : its power in relation to the discharge of incumbrances is also enlarged (s. 50).

Ss. 51 to 75 deal with conveyancing instruments and are intended to shorten them and do away with technicalities. A great saving of time and paper may be expected if full use is made of these provisions. The system of implied covenants contained in the Conveyancing Act, 1881, is extended by ss. 76 and 77, and the benefit and burden of covenants can be made to run with the land by indicating such intention and showing what lands are intended to have such benefit and bear such burden (ss. 78–80). A covenant by a person with himself and others is construed as if made with the others alone (s. 82). S. 84 gives to Official Arbitrators to be appointed as therein provided a somewhat vague power to discharge or modify restrictive covenants affecting land subject or not to compensation to persons suffering loss thereby, but it is too early yet to say whether this power will be beneficially exercised in the interests of the community.

Ss. 85 to 120 deal with mortgages. For about one hundred and fifty years[1] prior to 1925 mortgages of freeholds were effected by a conveyance of the legal estate to the mortgagee subject to redemption on payment of the mortgage money and interest. This leaving of the mortgagor, who in the eyes of the world is the true owner, with only an equitable interest is not in keeping with the scheme of the new Acts. The legal estate in fee-simple or for a term of years now remains vested in the mortgagor and the mortgagee also takes a legal estate, namely, a term of years, or, in the case of leaseholds, a subterm (ss. 85 and 86), with power to convey the fee or the head term when exercising his statutory power (ss. 88 and 89). The new legislation also provides another method of creating a mortgage, namely, a charge by way of legal mortgage (s. 87) : ordinarily a mere charge would not give a mortgagor the protection and advantages which are afforded by the possession of a legal estate, but the charge under s. 87 does so by reference to the mortgage by demise and the two forms are really the same. Mortgagors seeking to redeem are protected against consolidation unless such power has been reserved (s. 93), and tacking is abolished except in respect of obligatory further advances, and those made by arrangement with subsequent mortgagees or without notice of subsequent mortgages.

[1] The new procedure is a reversion to the method in force in " classical " times. Holdsworth's *History of English Law*, 3rd ch., vol. iii, p. 129 ; Pollock and Maitland (ed. 1911), vol. ii, p. 122.

A mortgagor entitled to redeem may call upon the mortgagee to transfer instead of reconveying (s. 95). The mortgagee's powers of leasing and accepting surrenders are enlarged (ss. 99 and 100) and can after the appointment of a receiver be exercised by the mortgagee without his assuming the responsibilities of a mortgagee in possession. A person dealing in good faith with a mortgagee is not concerned with the trusts affecting the mortgage money even when he has notice of them (s. 113). S. 114 provides for a short form of transfer and by s. 115 a mortgage can be vacated and transferred by an endorsed receipt.

The remedies for recovering rent-charges are improved (s. 121) and provision is made for the creation of one rent-charge payable out of another (s. 122). A statutory declaration by an attorney that he has not had notice of the revocation of his power, if made contemporaneously with his exercise of it, is to be conclusive proof of such non-revocation (s. 124); powers of attorney relating to land have to be filed at the Central Office (s. 125), and a power given for valuable consideration to a purchaser of property devolves on the persons deriving title under him (s. 128).

The power to entail (s. 130) and the restriction on limitations on failure of issue (s. 134) are extended to personalty; the necessity of enrolling disentailing assurances is abolished (s. 133). The rules regulating the priority of competing interests in relation to dealings with equitable things in action, known as the rule in *Dearle* v. *Hall*, is extended to dealings with equitable interests in land and capital moneys (s. 137) and there are provisions with regard to giving notice of such dealings.

Ss. 139 to 154 deal with leases, which term includes under-leases and other tenancies (s. 154). Where a leasehold reversion is extinguished by merger the under-lessee's covenants are kept alive in favour of the estate into which the lease merges (s. 139) and covenants and conditions are apportionable on the severance of a reversion (ss. 140, 141). The Court is given power to relieve against forfeiture in respect of the internal decorative repair of a building (s. 147). Terms of years now take effect without entry, but a term, other than an equitable one, cannot be created so as to take effect more than twenty-one years from the date of the instrument creating it (s. 149). S. 153 extends the power to enlarge a long term into a fee-simple to cases where there was originally a rent having a money value but which has ceased to be payable.

The rule prohibiting a limitation to the unborn child of an unborn

person, known as the rule in *Whitby* v. *Mitchell* is abolished (s. 161). Where in a will or instrument *inter vivos* the vesting of property or the ascertainment of a beneficiary is made to depend on the attainment by the beneficiary of an age greater than twenty-one, the limitation which would have been void for remoteness, is saved by the age of twenty-one being substituted for the greater age (s. 163). Where accumulations of income are made during a minority such period is not to be taken into account in arriving at the limit of time beyond which the law does not allow accumulations to be made (s. 165).

The necessity of acknowledging deeds made by married women is abolished (s. 167), and the concurrence of their husbands in certain other transactions affecting property is dispensed with. The Court is given power to direct a settlement to be made of the property of a lunatic or defective (s. 171) and the considerations which should influence the Court in making such a settlement are indicated.

Contingent and future gifts made by will are to carry the intermediate income unless it is otherwise disposed of (s. 175). A testator can by a specific or general reference thereto dispose of an entailed interest in possession as if he were absolute owner and so bar the entail (s. 167). A will expressed to be made in contemplation of marriage is not revoked by the event (s. 177).

All property of a corporation sole devolves on and passes to the successive corporators (s. 180), which was not formerly the case as regards leaseholds and the benefit of contracts. Where two or more persons die contemporaneously, as in an accident, it is to be presumed in the absence of evidence that they died in order of seniority (s. 184). Rights of pre-emption affecting legal estates are capable of release and until released are equitable interests only (s. 186). A legal easement enures for the benefit of the land to which it is annexed (s. 187). The Court is empowered to order a division in specie of chattels belonging to persons in undivided shares (s. 188). To remove doubts it is declared that a power of distress by way of indemnity against a rent of, or a breach of covenant in relation to, land is not a bill of sale and that the benefit of all covenants and powers by way of indemnity are annexed to the land (s. 189). S. 190 provides remedies for a person who is required to pay a rent which has not been legally apportioned but which as between himself and a third party is payable wholly or in part by the third party and by s. 191 machinery is provided for the apportionment and redemption of rents by the Minister of Agriculture and Fisheries.

The Administration of Estates Act, 1925.—The Administration of Estates Act, 1925,[1] is a consolidating Act and the schedule of repeals contains forty-seven enactments ranging from the Statute of Westminster II (1285) to the Law of Property Amendment Act (1924) and includes the Statute of Distributions of 1670, the Administration of Estates Acts of 1798, 1833 and 1869, and the Intestates' Estates Acts of 1884 and 1890. The Act, however, is not merely a consolidation, for amongst other changes it introduces an entirely new code of intestate succession.

The rules relating to the devolution of the property of a deceased person are recast and the old law as to chattels real is applied to real estate including settled land, land held by way of mortgage, and an interest appointed under a general power or under the statutory power to dispose of entailed interests.

Protection is afforded to persons dealing with a *de facto* personal representative (ss. 6 and 37) and proving executors are entitled to exercise all the powers of a personal representative (s. 8). The number of personal representatives is limited to four, and if there is only one (not being a trust corporation) the Court may during a minority or the subsistence of a life interest appoint additional representatives (Judicature Act, s. 160). S. 161 of the Judicature Act relates to the granting of probate to a trust corporation and s. 165 of the same Act to administration during the minority of an infant executor. Provision is made whereby the trustees of the settlement become the testator's special executors in respect of his settled land (ss. 22 and 24). The rest of Part II is for the most part a codification of the existing statute law.

The real and personal estate of a deceased person or in respect of which he has a power of disposition are assets for the payment of his debts (s. 32) and devolve on his personal representatives, and in the case of an intestate devolve on them upon trust for sale (s. 33). In an insolvent estate funeral and testamentary expenses have priority, and subject thereto the order of administration is the same as in bankruptcy, the personal representative having a right to prefer creditors in respect of both legal and equitable assets (s. 34 and 1st schedule). In a solvent estate the order of application, unless expressly varied, is: (*a*) property undisposed of by will subject to pecuniary legacies; (*b*) residue subject to pecuniary legacies not provided for by the above; (*c*) property given for the payment of

[1] See Wolstenholme and Cherry, *op. cit.*, vol. ii, pp. 472–590; Carson, *op. cit.*, pp. 425–89.

debts ; (*d*) property charged or given subject to a charge for debts ; (*e*) the fund returned to meet pecuniary legacies ; (*f*) property specifically given, rateably ; (*g*) property appointed under a power of disposition, rateably. Real and personal estate are on the same footing throughout : charges are payable primarily out of the property charged (s. 35). S. 36 is an example of the curtain principle, whereby trusts and beneficial interests are hidden from the eyes of the world and kept off the title : personal representatives can by an assent in writing transfer the legal estate to any named person, not being an infant. Such an assent is, in favour of a purchaser without notice of a previous assent endorsed on the probate or letters of administration, sufficient evidence that the assent was made to the person entitled to the legal estate. Notice that all liabilities have been discharged does not invalidate a conveyance by a personal representative. The Court is given powers to aid a creditor in following assets (s. 38). The powers of personal representatives as to management, raising money and appropriation, and incidental thereto, are enlarged and apply whether the deceased was testate or intestate (ss. 39–41). Executors and administrators may appoint themselves or any other persons trustees of an infant's share (s. 42) and may allow a person entitled into possession of land before giving an assent (s. 43).

Part IV contains the new code which puts an end to that "interesting specimen of antiquity most carefully preserved," [1] the rules relating to the devolution of the real estate and the distribution of the goods and chattels of an intestate. Real and personal property are made subject to the same rules of descent and the law now gives equal rights to males and females and makes for a person dying intestate a will which he might not improbably have made for himself. It sounds the knell of two hoary institutions which few will seriously regret, "the insolent prerogative of primogeniture" [2] and the "grandly barbarous, nay prehistoric" [3] postponement of women. All existing modes of descent, either by law or by custom, tenancy by the curtesy, dower and escheat are abolished (s. 45) and the residuary estate of an intestate is distributable as follows (s. 46) : (1) a surviving spouse takes all personal chattels and a charge for £1,000 with interest at 5 per cent. per annum from the date of death ; (2) subject thereto, if the intestate leave no issue, the property goes on trust for the surviving spouse for life ; or, if

[1] Maitland, *Collected Papers*, vol. i, p. 175.
[2] Gibbon's *Roman Empire*, ch. xliv. [3] Maitland, *op. cit.*, vol. i, p. 176.

leaving issue, on trust as to one moiety for the surviving spouse for life with remainder to the issue on the statutory trusts, and as to the other moiety for the issue on the statutory trusts, but if such trusts fail in the life of the surviving spouse on trust for the spouse for life; (3) if the intestate leaves issue but no spouse, for the issue on the statutory trusts; (4) if the intestate leaves no issue, then subject to the interest of the surviving spouse on trust for the intestate's parents in equal shares or the surviving parent absolutely; or if both parents are dead, then on the statutory trusts for the intestate's brothers and sisters of the whole blood, failing such, of the half blood, or failing such, to his grandparents in equal shares or the survivors of them, or failing such, to his uncles and aunts of the whole blood, and failing such, to uncles and aunts of the half blood and failing such, to the surviving spouse absolutely. If all the above trusts fail the residue goes to the Crown as *bona vacantia*. The statutory trusts in favour of a given class mean (s. 47) trusts in favour of the members of the class who attain twenty-one or marry, if more than one in equal shares, and the issue living at the death of the intestate who attain twenty-one or marry of any member who predeceased the intestate, such issue to take *per stirpes*. In a partial intestacy the same rules apply subject to a proviso for hotchpot amongst the issue of the deceased (s. 49).

As a result of these provisions kindred more remote than second cousins and their issue are excluded altogether, the property going to the Crown. The object of this rule is not to benefit the Crown financially, but to avoid the cost of collecting evidence of remote relationships which in the past has frequently exhausted the whole estate. The Crown is expressly empowered to distribute the property amongst deserving dependents of the intestate in accordance with the former practice of the Treasury (s. 46, vi). In real life the only effect will be to render impossible the remote windfall fortunes dear to the heart of the sensational novelist; but as legal accuracy has never been one of that gentleman's strong points, he will probably treat the Act as a dead letter. On the death intestate of a person who was a lunatic or defective of full age at the commencement of the Act his property devolves in accordance with the provisions of the old law (s. 51).

To welcome the abolition of primogeniture is not, as it would have been some years ago, to enter upon a political controversy. The pre-eminent position of the eldest son can, and doubtless will, be

prolonged amongst the landowning classes by means of settlements made either by will or *inter vivos*. Indeed such a custom is essential so long as the present basis of English rural life and agriculture remains undisturbed. Where harm was done in the past was by the fact that the law of primogeniture was applied to all intestacies and intestates were usually just the people to whose property it was singularly inapplicable.

The Trustee Act, 1925.—The Trustee Act, 1925,[1] reproduces the Act of 1893 with improvements and codifies the law affecting the powers and duties of trustees. Of the older legislation there remains unrepealed ss. 1 and 8 of the Trustee Act, 1888, giving protection by means of the defence of lapse of time which will presumably be consolidated some day with the Limitation Acts and ss. 1 and 7 of the Trust Investment Act, 1889, dealing with investments by local authorities.

By Part I the list of authorized investments has been revised and brought more nearly up to date, and by s. 10 trustees have been given certain powers ancillary to their investment power, such as the right to concur in the reconstruction of a company in which they hold shares. The investment list may still be said to be one of a conservative nature, but no extensions are at present contemplated.

Trustees may, whether the trust was created before or after the Act, sell or concur in any sale by auction or exchange of their land or any part thereof, whether the division is made horizontally or vertically or in any other way (s. 12) and may, in respect of an undivided share, act in conjunction with the owners of the other shares (s. 24). The power to give receipts for personal property transferable to them cannot now be excluded by the trust instrument (s. 14), and the power to compromise claims and compound liabilities has been redrafted and enlarged (s. 15). Trustees may sell or mortgage any property in possession to pay capital moneys the payment of which is authorized by the trust instrument or by law (s. 16) and purchaser and mortgagee are not concerned with the need for or the application of moneys paid to a trustee selling under a trust or power (s. 17). S. 18 consolidates and amends the law relating to the devolution of a trusteeship. By s. 20 money receivable under a policy of insurance against damage or loss when the policy has been kept up by reason of any trust, power, covenant or

[1] See Wolstenholme and Cherry, *op. cit.*, vol. ii, pp. 339–462; Carson, *op. cit.*, pp. 1020–1112.

obligation, or by a tenant for life impeachable for waste, is made capital money. A power to deposit documents at a bank for safe custody is given to trustees (s. 21). They may on the falling into possession of a reversion agree to the value thereof and give a release to the accountable parties, allowing such deductions for duties and costs as they think proper: nor need they take proceedings in respect of a reversion unless required in writing so to do by some person beneficially entitled and their costs are duly provided for (s. 22). The power to employ agents is enlarged to bring it into line with modern business requirements and trustees are not responsible for the defaults of such agents if employed in good faith (s. 23). A trustee (including a tenant for life and statutory owner) intending to go abroad for more than one month may by a duly verified power of attorney filed at the Central Office, and, if affecting land, at the Land Registry, delegate his trust to any person not being his sole co-trustee and such power, if supported by a statutory declaration that the trustee has not returned from abroad, protects persons dealing with the attorney without actual notice that the power has never come into operation or has been revoked (s. 25). Trustees and personal representatives liable as such for rent or on covenants in a lease (including an underlease and an agreement) or grant in consideration of a rent-charge or on an indemnity given in respect of the same may, without incurring personal liability for subsequent claims, convey the property to the persons entitled to call for a conveyance and may distribute their trust estate if they satisfy the liabilities up to the date of such conveyance, and, when necessary, set aside a fund to answer future claims: this is without prejudice to the right of the lessor or grantor to follow assets (s. 26). The protection by means of advertisements of an intended sale formerly enjoyed by personal representatives is extended to trustees and now applies to real as well as personal estate and cannot be excluded by the trust instrument (s. 27). Information obtained by a trustee when acting in one estate does not in the absence of fraud affect him with notice in respect of any other trust (s. 28). S. 31 clarifies and enlarges the trustees' powers of maintenance of infants and alters the destination of accumulations made during a minority, and by s. 32 trustees of a personalty settlement have a power of advancement up to one-half of the presumptive share whether the person advanced has an absolute interest or one liable to be defeated or cut down by his death under a certain age or the occurrence of any other event or by a power of appointment or revocation or by an

increase of a class to which he belongs. The old common form "spendthrift trusts" are to be implied by the use of the term "protective trusts for the benefit of" (s. 33).

The number of trustees is in ordinary cases limited to four (s. 34) and the power of appointing new or additional trustees is amended to meet the effect of some decisions under the old section and in the light of the alterations in the law made by other provisions of the new Act (ss. 36 and 38). Deeds made after 1925 contain a vesting declaration by implication (s. 40).

The powers of the Court in relation to the appointment of trustees are re-enacted with slight extensions by ss. 41–3 and those in relation to vesting declarations are amended and brought up to date by ss. 54–6. A new section (s. 57) enables the Court, where it is expedient, to authorize trustees to carry out sales, purchases and other transactions which are not empowered by the trust instrument.

With regard to trustees for sale and personal representatives it is important to remember that in addition to the provisions of the Trustee Act and the Administration of Estates Act they have the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 (Law of Property Act, s. 28 ; Administration of Estates Act, s. 39).

Settled Land Act, 1925.—The Settled Land Act, 1925,[1] consolidates and extends the Settled Land Act, 1882–90, whereby a tenant for life or other limited owner was given powers of dealing with the property subject to a settlement as if he were absolutely entitled, proper safeguards being enforced for the protection of the persons interested in remainder. By s. 1 the definition of a settlement is extended to include a limitation of land in trust for an infant or contingently for any person, a limitation to a married woman subject to a restraint on anticipation and an absolute interest subject to family charges.

The powers of sale, leasing and management given by the Act to tenants for life, as defined by s. 19, and to the persons on whom s. 20 confers the powers of a tenant for life are exercisable by them even when they are given by the instrument creating the settlement to some other person (ss. 108, 109) and even when the tenant for life has parted with his beneficial interest in the property (s. 104), though he may release his powers with a view to their being exercised by the trustees of the settlement.

[1] See Wolstenholme and Cherry, *op. cit.*, vol. ii, pp. 20–321 ; Carson, *op. cit.*, pp. 855–1013.

A settlement is now created by two instruments, a trust deed which declares the beneficial trusts upon which the property is to be held and a vesting deed or vesting assent whereby the legal estate in the property is declared to be vested in the tenant for life in fee-simple or for the whole estate which is the subject-matter to the settlement, subject to the trusts declared by the trust instrument, and the names of the trustees of the settlement are specified. The latter deed alone appears on an abstract of title and a purchaser is not concerned with the trust deed when he buys from the person in whom the legal estate is declared by the vesting instrument to be vested and pays the purchase money to the persons named as the trustees, provided they are not less than two in number or are a trust corporation (ss. 110, 94). When a tenant for life dies he is deemed to have appointed the trustees of the settlement his special representatives in respect of the settled land. They obtain a grant of probate limited to the settled land and hold it, subject to their rights in respect of administration and death duties (s. 8), on trust to convey it by a vesting assent to the person next entitled under the trust deed (s. 7). S. 30 defines who are the trustees of a settlement for the purposes of the Act, and is so framed that it will not often be necessary to seek the assistance of the Court under s. 34 in appointing trustees.

The provisions of the Act relating to limited owners' powers (Parts II, III, IV and V) are of a rather too complicated nature to be usefully discussed in detail in this place. Generally speaking, the limited owner dictates the policy which shall be adopted with regard to the settled land, but he acts in a fiduciary capacity as between himself and the other person interested under the settlement (s. 107). The trustees of the settlement are merely the persons into whose hands all capital money is paid for the protection of the inheritance.

The Act will, of course, affect all the large estates which are subject to strict settlements, but in the case of small properties it will probably be found that the form of settlement by means of a trust for sale, previously discussed,[1] is more suitable. The provisions of the Act are, however, of general importance, since the powers conferred on tenants for life and the trustees of a settlement are inferentially given to trustees for sale[2] and personal representatives,[3] and to the trustees of land held for charitable, ecclesiastical or public purposes.[4]

[1] *Ante*, p. 11.
[2] Law of Property Act, 1925, s. 28.
[3] Administration of Estates Act, 1925, s. 39.
[4] Settled Land Act, 1925, s. 29.

CLAIMS BY AND AGAINST THE CROWN.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Crown Proceedings Committee.—It must be deeply regretted that the scope of the reference made to the Crown Proceedings Committee [1] was so limited, and that as a result no guidance has been given by that body regarding the principles affecting claims by subjects against the Crown. The original reference by Lord Birkenhead in 1921 was, indeed, based on the assumption that the position of the Crown in litigation might properly be assimilated to that of a private person, but it left the way open for full consideration of the issues, and it was only in 1924 that Lord Haldane reduced the functions of the Committee to those of drafting a Bill on the assumption that such assimilation was both desirable and feasible. The Committee was definitely, as a result, restricted to devising means for the abolition of the mode of procedure by information and petition of right; the assimilation of procedure where the Crown was a litigant to that between subjects, including such matters as discovery and costs; the placing of the Crown with certain reservations in the same position as a subject as regards the power to sue and the liability to be sued in the County Courts; and the imposing on the Crown of liability to suit in tort. The public, therefore, which is naturally concerned to learn the reasons for the change in policy, has lost the great advantage which would have been derived from a full exposition of the subject by a Committee so rich in legal talent. It is, therefore, hardly surprising that it has taken remarkably little interest in the report, and that, as a result in part of this apathy, no steps were taken forthwith to carry through Parliament the Bill so carefully drafted by the Committee, after hearing the views of the Government Departments which would be affected by the changes proposed in the law.

The Principle of Assimilation.—Yet it is by no means obvious that the principle that the Crown and the individual should be placed on the same footing is one for unhesitating acceptance. It is, of

[1] Parl. Paper, Cmd. 2842.

course, easy to make out a strong indictment against Crown privileges and immunities, and to suggest that they are relics of antiquity without further use. Further the modern trend of political philosophy in favour of diminishing the sanctity of the State and of reducing it to one, perhaps not the most valuable, form of social organization, tells prima facie in favour of abolishing distinctions between the State and any other social aggregation, or even between the State and the individual. Moreover, it is quite easy to compile, as Professor Morgan [1] has done with conspicuous success, a list of instances in which the Courts have uttered protests against efforts on the part of Government Departments to ride roughshod over the rights of individuals. But even here we must beware of exaggeration, and we must not take too seriously *obiter dicta* by judges which their authors probably would not wish to stress. When one finds the bureaucracy accused of abuse of power for collateral objects,[2] and of putting forward claims which are " grotesque " [3] or " tyrannical " [4] or of " hardihood in support of what was wrong seldom surpassed in a court of justice," [5] one is at first tempted to believe that there is something radically wrong in the administration of the British state. But, when one consults the cases in question, one finds that from a moral point of view the claims by the Crown, while open to doubt, were far from obviously unjust, and that perfectly honest men in Government offices might put them forward without incurring any moral obliquity or aiming at oppressing the individual. Nor after all is this surprising. It is idle to suppose that actions of importance by governmental departments are the outcome of decisions of irresponsible bureaucrats, as one might be tempted to believe when reading some of the indictments of the existing system. In these cases, if matters were investigated *au fond*, it would be found that the action of the department was advised by honest if mistaken legal advisers—sometimes even by the Law Officers of the Crown themselves, as in what is in some ways the most serious case of overriding the liberty of the subject, Art O'Brien's case,[6] and that it was deliberately sanctioned, on the strength of such advice, by a minister of the Crown, owing his

[1] Introduction to G. E. Robinson's *Public Authorities and Legal Liability*, pp. lxxx ff. See also W. P. M. Kennedy, *Canadian Bar Review*, vi, 329–38.

[2] *Marshall Shipping Co.* v. *The King*, 41 T.L.R. 285, *per* Rowlatt, J.

[3] *Food Controller* v. *Cork*, [1923] A.C. 647, 662, *per* Lord Atkinson.

[4] *Postmaster-General* v. *Liverpool Corporation*, [1923] A.C. 587, 601, *per* Lord Shaw.

[5] *Ibid.*, 602, *per* Lord Carson.

[6] [1923] 2 K.B. 361.

position to the will of the people. Even in the remarkable case of the action of the Government of Kelantan in connexion with the claims of the Duff Development Co.,[1] it must be remembered that not only was a satisfactory settlement finally accomplished, despite the inability of the Courts to intervene, but that it was the duty of the British officials responsible for the actions of the Government to protect the people of the State as far as possible from the results of unwise administration of the resources of the State under British advice. Nor again is it relevant to argue[2] that, as the law now stands, a Socialistic Government which undertook vast schemes of commercial and industrial enterprise in the name of the State would find itself in possession of prerogatives which would give it an enormous advantage in competition with the ordinary individual. Even if we reject the argument which now predominates in Italian public life, that the State is all in all, we may well argue that the State is never on a par with the individual; it is a means for the fuller development of the life of the individual, and it may, therefore, quite justly be given a position in law superior to that of any individual. Public opinion has acquiesced in the *status quo* so long, simply because it accepts this fundamental doctrine and it considers that on the whole no grave injustice occurs under the system. Nevertheless the increased scope of governmental functions and the growing pressure of revenue proceedings, as a result of the necessity of raising the enormous revenue now required by the State, have unquestionably given occasion for a reconsideration of the position in principle, and it is precisely here that the withdrawal from the Committee of any discretion to advise has been so unfortunate.

The Special Privileges of the Crown.—It is, of course, easy to stress the exceptional privileges of the Crown as a litigant,[3] but any such statement should be accompanied by a consideration of the extent to which these privileges can be justified by reason of the superior claims of the State over the individual, and the actual operation of the privileges, not their possible misuse, must be considered. It is, for instance, perfectly clear that the procedure by petition of right is equivalent in matters of contract and property claims to an effective right to sue the Crown. Granted that the right to fiat rests with the Crown, nonetheless it is certain that that right is exercised in every case where there is a scintilla of a claim, and

[1] [1923] A.C. 395; [1924] A.C. 797.

[2] Morgan, *op. cit.*, p. xv, n. 3.

[3] Morgan, *op cit.*, pp. xv ff.

that a fiat has often been granted for petitions which from the nature of things were perfectly hopeless. The Law Officers who advise in these matters have always acted deliberately on legal principles ruling out political considerations,[1] as is sufficiently proved by failure of critics to adduce a single real case of hardship in this regard. Nor is it easy to feel any indignation at the rule that the subject in a petition of right may only amend his pleadings if the amendment be such that a fiat would have been granted by the Crown for the petition thus amended if presented to it in the first instance.[2] Complaints of the possession by the Crown of special processes for compelling payment of debts and duties and taxes owing to it, ignore the fact that the State's demands are for the common good, and that those who delay or seek to evade payment act unfairly to their fellow subjects. The Crown has lost priority both in bankruptcy[3] and in the winding up of companies, and the chief real hardship unquestionably lies in the issue of costs, the law regarding which is admittedly and obviously, unsatisfactory, and, less conspicuously, in the fact that the Crown is not liable in tort. On this latter point it is possible to defend Professor Dicey[4] against Professor Morgan's lively onslaught,[5] in part at least. There is much, on the whole, to be said for the acceptance of the rule that the State should be made liable for the torts committed by its servants in executing their duties, in lieu of giving a remedy against the servant only. But the change would not be all gain. "A jury," argues Professor Morgan, "in assessing damages will certainly be more inclined to award substantial compensation if the action is brought against the Postmaster-General instead of the "postman" or against the Crown instead of the "policeman." This is very true, and in it lies the risk of as much injustice to the Crown, that is, the public interest, as there exists for the individual affected by a Crown officer's tort under the existing system. Whether it be a local authority or a Government department, there is only too good reason to fear that juries would give exaggerated awards, and after all it is no more just that the State should be mulcted unduly than that the individual should be refused just compensation. In the second place, proceedings against officials do not serve merely the two purposes apparently contemplated as alone possible by Professor Morgan, the punishment of the offender, as a matter of

[1] Cf. *In re Nathan*, 12 Q.B.D. 461.
[2] *Badman Bros.* v. *The King*, [1924] 1 K.B. 65.
[3] *Food Controller* v. *Cork*, [1923] A.C. 647.
[4] *Law of the Constitution* (1915), p. xlvi.
[5] *Op cit.*, p. lviii.

vengeance or retaliation, or compensation to the injured subject. They serve the very useful purpose of deterring the officials of the Government from illegal acts. At present every officer recognizes that he is bound to observe the law, and that, if he violates it, he must answer for his wrongdoing, subject merely, if he has a prima facie case and has acted on the whole with reasonable prudence, to reimbursement by his department from public funds. Under the rule that the State is liable,[1] there must inevitably be a relaxation of individual sense of responsibility; the officer knows that it is the department that will be sued and will pay, and that he will not be subjected to the painful necessity of approaching the head of his department and asking him to provide funds for his defence, a request which is never granted as a matter of course. The distressing waste of public money from time to time by departmental carelessness, which the reports of the Public Accounts Committee so often reveal, are unquestionably largely encouraged by the rule of the service that it is the public which pays for official blunders, and that only in the most exceptional cases is an officer called upon to refund any portion of money lost by his laches.

Proposed Reforms in Procedure. The Committee's Bill.—The Bill drafted by the Committee shows that the difficulties of the situation have been fully realized, and in some degree provided for. The general principle of assimilation of the position of the Crown to that of an ordinary litigant, including liability to be sued in tort, is indeed asserted, but is rendered subject to exceptions of a very important kind, which would in large measure reduce the likelihood of any substantial injury to public interests under the change, but which at the same time reduce very greatly the advantage to the subject of the changes contemplated. Execution still cannot issue against the Crown; all that can be obtained is merely a certificate of any sum due, with costs, and payment will necessarily depend on the possession by the department of the Treasury of funds legally available. Orders obtained by the Crown may only be enforced as in the case of an order in an action between subjects, but this limitation is not to apply to orders made in proceedings by the Crown for the recovery of fines or penalties, or for the forfeiture or condemnation of any goods. Imprisonment of Crown

[1] The Court might well have been given power to order payment of the whole or part of damages or costs by an officer if his conduct deserved it, thus securing that individual officers should have a motive for regard for law. This would negative any moral claim by the officer; *Rogers* v. *Rajendro Dutt*, 13 Moo. P.C. 209, 236, *per* Dr. Lushington.

debtors, including debtors in respect of death duties, can still be obtained by order of a Court under sect. 5 of the Debtors Act, 1869. The privileges of the Crown in matters of procedure are not extinguished; rules of Court, whether in the Supreme Court or the County Courts, may provide special regulations for Crown cases, and they must confer on the Crown the right to deliver one set of interrogatories in any proceedings without leave of the Court where such delivery would be possible under the existing law; the Crown must be allowed to apply summarily to the High Court in certain matters affecting death duties, to arrest offenders against the customs laws in lieu of proceedings by writ of capias, and to serve documents in customs proceedings in a manner similar to that now in force. The plaintiff may not enter judgment against the Crown in default of appearance or pleading without the leave of the Court after notice to the Crown; evidence may be taken on commission in Crown proceedings; summary judgment without trial is excluded, and any Court is to be at liberty on the application of the Crown to refuse to allow a defendant any set-off or counterclaim in proceedings for duties or penalties, or if the set-off or counterclaim does not relate to the department in whose name proceedings are being taken, or the proceedings are being brought in the name of the Attorney-General; in compensation the Court may refuse to allow the Crown to avail itself of a set-off or counterclaim if the subject-matter cannot conveniently be disposed of together with the claim. The subject also is given in case of a claim, or reasonable apprehension of a claim, for death-duties the right to a summary determination of his liability by the High Court.[1] The rule that judgment debts carry interest is applied to debts due by or to the Crown alike, and the Crown may be a party to interpleader proceedings; moneys payable by the Crown may be subjected to attachment, but the value of this concession is made minimal by the necessary exemption from the rule of all salaries paid to officers of the Crown and any money which may not be alienated, assigned or charged by the payee. Much more important is the provision that costs in Crown proceedings and arbitration shall be dealt with as in cases between subjects, save that where the Attorney-General or any department or officer is a necessary party to proceedings under statute, the Court may order the costs of the Crown to be paid by another party, a procedure obviously

[1] Cf. *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; [1912] 1 Ch. 158; *Burghes* v. *Attorney-General*, [1911] 2 Ch. 139.

applicable to legitimacy proceedings.[1] Discovery may be obtained against the Crown, but only subject to complete safeguards for the Crown to withhold documents or to refuse to answer interrogatories, if production or answer would be injurious to the public interest. It is noteworthy that it is proposed to make it perfectly clear that a certificate under the hand of the head of a Government Department shall be conclusive in the matter of production or answer, thus negativing any suggestion of power of the Court to require the personal appearance or certificate of a minister[2]; it may be thought that a ministerial certificate might have been demanded. The Crown also will be privileged to secure the removal to the High Court of any proceedings instituted against it in a County Court, nor can a case be sent to a County Court without its assent, while mere declarations of right must take the place of relief by injunction or orders for specific performance, or recovery of land, or delivery of property. The Attorney-General is also relieved from proceeding in relator actions, but given full power to control the institution and discontinuance of such actions, a provision of somewhat dubious public advantage.

Proposed Substantive Rights.—The liability of the Crown in tort is conceded in cases where a principal is liable for acts of his agent, and, as an attempt to define more precisely the extent of the obligation, while not derogating from its generality, there is laid down the rule that any officer of the Crown acting, or purporting in good faith to be acting, in pursuance of a duty imposed by law shall be deemed to be the agent of and acting under the instructions of the Crown. No action will lie unless it would have lain against the officer personally, and the Crown is exempt in any case where an officer is exempt, and has the benefit of the Public Authorities Protection Act, 1893. Curiously enough the Bill is not explicit as to whether the officer remains personally liable, but the wording suggests that it is assumed that his liability ceases and this accords with the rule that an officer can never be responsible for the contracts of the Crown. The protection of the Act of 1893 is inevitably a very serious limitation of the benefit to be conferred on the subject, for that Act is doubtless unduly favourable to public authorities

[1] *E.g.*, under the Legitimacy Act, 1926, *Greenway* v. *Attorney-General*, 44 T.L.R. 124.

[2] The wide assertion of authority by the Commonwealth High Court in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth*, 16 C.L.R. 178, has been in effect reduced to narrow limits by the later judgment in *Griffin* v. *State of South Australia*, 36 C.L.R. 378. *Cf.* for Scotland, *Admiralty Commrs.* v. *Aberdeen Steam &c. Co.*, 1909, S.C. 335.

and may easily defeat the ends of justice.[1] But far more important are the other exemptions from liability. The first is in respect of acts done in furtherance of, or in course of, or in execution of, judicial proceedings, and, while the exception is extremely convenient, yet it is extremely difficult to defend it, if the principle is adopted that State and individual are to be assimilated. The second denies compensation for loss, deterioration, damage, or delay in respect of goods from acts of officers of customs and excise, again an exception of doubtful justification ; the third exempts all dealings with postal packets or telegrams, save that a legal right is given to recover up to the amount insured in the case of registered postal packets. Here again we have an exception which is impossible of logical justification. Much more satisfactory are the proposals to place His Majesty's ships on the same footing as private vessels as regards salvage, with the consequential application to them of the provisions as to limitations of liability of the Merchant Shipping Acts and the Maritime Conventions Act, 1911. Unexceptionable also is the saving of the authority of the Crown in the lawful exercise of the prerogative or statutory powers, and the prohibition of proceedings *in rem* against the ships, airships, or other property of the Crown, as well as the restriction of rights to British subjects, with power to extend them to subjects of foreign powers on condition of reciprocity. Whatever may be said on grounds of principle against such differentiation on score of nationality, it is clear that the grant of such privileges conditionally is of value as securing international reciprocity. But no concession has been made in the matter of patent rights[2] ; the position is left as under the Patents and Designs Act, 1919, nor is any right of action in tort permitted to members of the armed forces of the Crown in matters connected with discipline or duties or the enforcement thereof. Yet it must be admitted that, however inevitable this exception may be deemed, it is precisely in this sphere that abuse of official power and the absence of remedy have been most distinctly revealed. Naturally and properly in matters of contract and tort alike proceedings shall lie only in respect of obligations or torts of the Government of the United Kingdom and its officers, thus establishing what has recently been asserted by the Courts that a petition of right lies only in respect of liabilities of the Crown in respect of the United Kingdom[3] ; and the measure will not affect criminal proceedings, proceedings on the

[1] *Freeborn* v. *Leeming*, 42 T.L.R. 119.
[2] *Journal of Comparative Legislation*, Third Series, vol. x, pt. i, p. 123.
[3] *Price* v. *Regem*, 42 T.L.R. 179.

Crown side of the King's Bench Division, or matters of prize, still less the King in his private capacity, which thus is marked off by a very definite distinction from the public aspect of the Crown.

The Limited Scope of the Bill.—While the measure as drafted will clearly serve useful purposes and especially in matters of costs be a substantial benefit to the subject, it must be noted that it does not attempt to deal with the far more interesting question of administrative law. When complaints against the present state of affairs are investigated, it will be found more and more clearly that the chief difficulty at the present day is the constant tendency to entrust important powers affecting the rights of the subject to administrative bodies, free from any effective control. Professor Morgan rightly calls attention to the powers given to departments by such Acts as the Small Holdings and Allotments Acts, 1908 and 1919,[1] and the Housing and Town Planning Act, 1909,[2] or to the Board of Education by the Education Acts,[3] and these are all matters with which the Bill of the Committee in no wise interferes. The powers given by these and other measures are beyond any intervention by the Courts, and yet it is impossible for the subject to feel that he will necessarily receive fair treatment from the departments concerned, which, intent on carrying out their duties, may be tempted to overlook the rights of the individual in their eagerness to secure a legitimate end. It is really in this sphere that there is room for the serious consideration of the question [4] of creating administrative Courts which would be composed in part of judicial and in part of administrative officials, and which could be appealed to by those individuals who found themselves aggrieved by departmental decisions. There are difficulties in the way of such action, but the matter is essentially one deserving full examination, and it is a pity that the Committee, in lieu of being limited to drafting a Bill on a narrow basis, was not asked to consider fully the importance of this question. It is, of course, clear that the ordinary Courts are not in the least adapted, nor anxious,[5] to deal with these issues of administrative law, but it is certainly not proved that there is no alternative but to trust to the good sense of governmental departments, and to deny the possibility of any control more effective than public opinion. Prima facie the vast extension

[1] *Cf. Reddaway* v. *Lancashire County Council*, 41 T.L.R. 422.
[2] *Rex* v. *Local Government Board*, [1914] 1 K.B. 160; [1915] A.C. 120.
[3] *Board of Education* v. *Rice*, [1911] A.C. 179.
[4] Morgan, *op cit.*, pp. xlvii ff.
[5] Lord Sumner in *Roberts* v. *Hopwood*, 41 T.L.R. 436, 444.

of the administrative functions of the State amply justifies the earnest consideration of the adjustment of our legal institutions to deal with the emergent situation, but it is difficult for any Government voluntarily to suggest limiting the freedom of action of governmental departments, and the issue is one on which public opinion at present can hardly be moved to enthusiasm. It is possible, however, that action may be induced in the long run by the necessity of providing some simple means of keeping local authorities within the due limits of their powers.[1] The present means of control, whether by the Courts or by governmental departments, is far from ideal; the Courts are inevitably very chary of giving directions in matters which rest on the discretion of elective bodies, while central action is inevitably suspect as being motived by political considerations. It may be that some protection for individuals and for the local authorities themselves lies in developing the conception of administrative law, however remote such an idea may now seem.[2]

[1] *Cf.* the discussions in *Rex* v. *Roberts*, [1924] 2 K.B. 695 and *Roberts* v. *Hopwood*, [1925] A.C. 578; *Roberts* v. *Cunningham*, 42 T.L.R. 162; *Rex* v. *Roberts, Ex parte Woolwich Borough Council*, 24 L.G.R. 517; *R.* v. *Minister of Health, Ex parte Dore*, [1927] 1 K.B. 765; *Attorney-General* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516.

[2] Administrative courts might deal with the position and protection of civil servants and possibly even of members of the armed forces.

THE LEGAL POSITION OF WOMEN IN TURKEY UNDER THE OLD AND NEW REGIME, AND IN EGYPT.

[*Contributed by* Mr. Justice Frumkin, *of the Supreme Court of Palestine.*]

More than any other country, Turkey has been influenced by the Great War. On the one hand, it has lost numerous territories, but, on the other, it has gained strength and independence in the territories left under its control. The Turks were not successful in governing the widely-spread Ottoman Empire, with its large population composed of different nations, races and religions, handicapped, also, as they were, by the conflicting interests of the Great Powers. Left alone within a limited area, no longer harassed by the hostile and extreme demands of the Greeks, Bulgars and other Balkan peoples, and by the Armenians, Arabs and Kurds in Asia, the Turks have, considering the short lapse of time, done wonders in the reorganization of their country.

The radical changes introduced by Mustafa Kemal could not but influence the legislation of the New Turkish Republic, and numerous new laws and regulations have been introduced. In this article, it is intended to refer only to the effect of the new legislation in Turkey upon the legal rights and duties of women.

Pre-war Turkey, or as it should be termed, the Ottoman Empire —to distinguish it from the Turkish Republic of to-day—was a Moslem country, and as such governed by the sacred Moslem Law (Sheriat). It was not until the latter half of the last century that the Sublime Porte began to introduce legislation based on European Law, by promulgating in the Turkish language, and adopting as the law of the country the French Codes, except only the French Civil Code. The Moslem Law of personal status was, however, left untouched and was administered by religious tribunals known as the Sheria Courts. These decided all questions of marriage, divorce, etc., according to sacred Moslem Law, which has been but slightly influenced by Ottoman legislation. Even certain matters of

personal statutes of non-Moslems, *e.g.* inheritance, wills, guardianship, etc., were dealt with by the Sheria Courts and conformably to Moslem Law.

In December 1925, a new Civil Code was promulgated, based entirely on the Swiss Civil Code, with a few amendments suggested by a Committee and adapted to suit the special requirements of the Turks. By the adoption of that new Code, the Turkish woman has suddenly been released from the authority of an ancient Oriental system of law, entirely subversive of women's rights, and placed under the sway of one of the most modern laws of Europe and one which knows no legal discrimination between the sexes.

The change of the Law is so radical, and was effected in so short a period of time, that one wonders how it will work in practice among the Turkish people, almost unprepared as they were for the new state of affairs. But we are not here concerned with the social aspect of the problem. The legal aspect will best be dealt with by comparing item by item the rules of the personal statute of the Moslem woman—as it existed in the Ottoman Empire, with the Law as it is in force now in the Turkish Republic.

I. Form of Marriage.—Under Moslem Law, marriage may be contracted without special formalities. Oral offer and acceptance in the presence of two male, or one male and two female, witnesses are alone required. It may also be contracted by proxy. In the case of minority of either or both parties, the contract is entered into between the guardians or their agents. Upon conclusion of the contract, the marriage becomes valid, but the wife may resist consummation and cohabitation until she receives the part of the dowry payable in advance.[1]

The Ottoman legislation made it requisite that the marriage should be contracted in the presence of a delegate of the Religious Judge—Qadi Sheri—whose main duties were to see that in cases of marriage by proxy, the power of attorney was in due form, and to notify the administrative authorities of the marriage for purposes of registration.

The Turkish Civil Code introduces the system of the publication of banns through the channel of the Municipality or the Elders of the Village, within whose area of jurisdiction the bridegroom has his domicile. It allows fifteen days to any party concerned to

[1] Dowry (*Muhr*), is an amount payable by the husband to the wife, fixed either by agreement or by custom, and consists of two parts—one payable in advance at the time of the marriage contract, and the other, due at the dissolution of the marriage by the death of either party, or divorce.

raise objections to the proposed marriage, ten days for the bride or bridegroom to answer such objection and ten further days may be allowed by the Mayor or Elders of the village to the opposer to enable him to take proceedings before the competent Civil Court.

Where no objection has been raised, or the objection alleged is held to be unfounded, or the action is dismissed by the Court, a marriage licence is issued, valid for six months, during which period the marriage may be celebrated in the presence of any marriage official within the Turkish Republic. Upon the affirmative replies of the couple, the official declares the marriage to be validly contracted. In addition to this civil marriage, a religious marriage may be solemnized by the religious authorities, but only after production of the documents of the civil marriage.

II. Capacity to Marry. (Age of Consent).—The Moslem Law knows no minimum age limit to marriage. If the boy or girl is a minor, the marriage is contracted by his parents or other legal guardians. The attainment of majority under Moslem Law is synonymous with that of physical puberty. A girl who has completed her ninth or a boy who has completed his twelfth year, may claim and prove that he or she has arrived at the age of puberty. He or she is in any case considered by law to have attained that age at his or her fifteenth year, so that on completion of their fifteenth year, and sometimes much before that age, children of both sexes are considered to be of age, and can contract their marriage themselves without consent of their parents. Ottoman legislation has, however, interfered with these provisions of the Moslem Law by promulgating a law called the Family Law, dated 31st October, A.H. 1333 (1917), fixing the capacity to marry at eighteen years in the case of males, and seventeen years in the case of females. A boy who had not completed his eighteenth year might, however, claim to have reached puberty and upon proof thereof might obtain permission from the Qadi to marry. So also might a girl who had not completed her seventeenth year claim and prove puberty, and in this case the Qadi would grant her permission with the consent of her guardian. In no case would permission be granted if the boy were below twelve or the girl below nine years old.

The Turkish Civil Code fixes the age of capacity to marry at eighteen years in the case of males and seventeen years in the case of females.[1] In exceptional cases, and for very important reasons,

[1] Twenty and eighteen years respectively in the original Swiss Civil Code.

the judge may allow the marriage of children below that age and above fifteen years.[1] The age of majority is fixed in the Turkish Civil Code at eighteen years.[2] Marriage confers majority. The consent of the guardian is necessary in the case of the marriage of minors.

Polygamy.—The Moslem Law allows a man to marry not more than four wives, provided he does justice to all of them, not discriminating between them in any respect.

The Turkish Civil Code provides that no married person can re-marry unless and until the previous marriage has been dissolved by death, divorce or judgment.

Reciprocal Conjugal Rights and Property.—The Moslem Law puts the wife under the power of her husband. She owes him absolute obedience, and can hardly move without his special permission. As an illustration one might mention that she can visit her parents only once a week, and other relatives not more than once a year. She may receive visits from her parents and relatives only at the same intervals. In no case is she allowed to stay the night outside her house, without the consent of her husband. But while her liberty is subject to so severe a control, she enjoys full liberty in the administration of her property, and, in theory, may enter into contracts and dispose of her property without reference to her husband. In practice, however, the husband obtains a formal power of attorney from his wife, and is master of her property to no less extent than he is master of her person.

The Turkish Civil Code divides rights and duties fairly between husband and wife. The husband is the head of the family, and on him rests the duty of maintaining wife and children. He represents the family unit : but so far as the permanent needs of the household are concerned, the wife, who has the care of the household, also represents the unit. The husband is responsible for the obligations of the wife against any third party within reasonable limits. If the wife abuses the right of representation, or is incapable of acting, the husband may deprive her of such rights, without affecting *bona fide* third parties until advertised through the Notary Public. The wife may, with the express or implied permission of her husband, occupy herself in any trade or profession. If the husband withholds consent, the wife may obtain permission from the judge on proving that such occupation is for the benefit of the unit or the

[1] Above eighteen or seventeen years respectively in the original Swiss Civil Code.
[2] Twenty years in the Swiss Civil Code.

whole family. The wife is a proper party to an action, and the husband is obliged to represent her in actions relating to her private property. The Civil Code, further, lays down detailed provision as to the administration of property, allowing the husband and wife to adopt either the system of separate property, joint property or partnership in property.

Paternal and Maternal Rights.—Under the Moslem Law, the father only is the guardian of his minor children of either sex. It is he who disposes of their property and makes arrangements for their guardianship after his death. After the death of the father, if no guardian has previously been appointed by him, the paternal grandfather or anyone appointed by the latter is the guardian. Failing such, the Qadi appointed a guardian. The mother has no natural rights of guardianship, except that she may be appointed guardian by the father, grandfather or Qadi. In case of the dissolution of marriage, the custody of the child is granted to the mother until it attains the age of seven years in the case of a male, and nine years in the case of a female child.

The new Civil Code provides that as long as a marriage exists, parents exercise their guardianship jointly. In case of dispute, the father's view prevails. In the event of the death of the husband or wife, the guardianship rests with the surviving party. In the case of divorce, the Court uses its discretion to determine to which of the parents the custody of the children be entrusted. The party which has not received the custody of the children may be ordered to contribute towards their maintenance.

Divorce.—Under the Moslem Law, the husband alone, and the wife never, has power to divorce. The only case where the wife can apply for dissolution of marriage, is impotence of the husband. No reason is required for divorcing the wife and no special formalities. The wife is always at the mercy of the husband who, by thrice pronouncing the sentence expressing his desire to divorce his wife, makes the divorce valid and irrevocable. A husband, irrevocably divorcing his wife, could not re-marry her, unless she has been married to another husband, her marriage consummated, and she has been divorced by the new husband. A divorce is valid even if uttered in a state of anger and excitement.

And here, next to the abolition of polygamy, we have the most important reform in the Turkish Republican legislation as regards women. Divorce under the Civil Code is no longer dependent upon the wish or temper of the husband. The right to divorce is

vested both in the husband and wife, but only on good cause shown. As such are considered, 1. Adultery by either wife or husband; prescribed after six months from discovery, or after five years from the act. 2. An attack on life, or ill-treatment; prescribed as above. 3. Commission of offence of such a nature as to show demoralization of character by either husband or wife. 4. Leaving the house for the purpose of avoiding reciprocal conjugal duties, and remaining absent for three months. 5. Incurable mental disease lasting three years. 6. Disagreement to the extent of making cohabitation impossible. In any of these cases, action may be brought either for divorce or separation. The judge may grant either. If separation be demanded, no divorce can be ordered. If the judge considers reconciliation possible, he will order separation only, even if action is for divorce. Separation is ordered for the period of one to three years.

Woman's Share in Inheritance.—In Moslem Law, the female is considered half a male, not only as a witness, but also in her capacity as heiress. So the daughter inherits only a share equal to one-half the share inherited by her brother. The wife's share in the inheritance of her husband is only one-half of what her husband would inherit from her in case she died previously, and so on. Ottoman legislation has already interfered to some extent with that system of inheritance, and as regards immoveable property known as "Miri" land, a new Inheritance Law, based on the German Civil Code, was introduced in 1913, putting the woman on an equal footing with the man. But as regards moveable property and the category of land known as "Mulk" land, the discriminating Moslem Law still prevailed.

The new Civil Code, of course, knows of no discrimination.

Proposed Legislation in Egypt.—While the Turkish Republic has introduced all the above legislative reforms and many others, entirely disregarding the Sacred Law, the Egyptian Government, though anxious to introduce some changes in the obsolete Law of Personal Statute, to suit the modern conditions, especially in the cities, dares not to do so by secular legislation, but seeks to justify its legislative proposals by the principles of the sacred Moslem Law. The Egyptian Parliament has now before it two Bills, presented by the Government, touching matters of marriage and divorce, and great endeavours are being made by Explanatory Notes appended to the Bills to prove that the draft is not contrary to Moslem principles. The main objects of the new proposals are :—

A. Restriction of Polygamy.—It is provided that any additional

marriage be subject to permission from the Qadi. The Qadi will withhold permission unless on inquiry he is satisfied that the husband is in a position to live on good terms (*en bonne intelligence*) with his wives, that he is able to support another wife in addition to his previous one or ones. The Qadi will also take into consideration the obligations of the applicant towards his children and parents.

B. Restriction of Power of Divorce by Husband.—In this connexion, the draft law provides that divorces pronounced by the husband in a state of drunkenness or under compulsion shall be invalid ; also that no divorce shall be valid without permission of the Qadi. The Qadi will withhold consent until he has done his best to establish the cause of the disagreement, and tried his best to reconcile the husband and wife.

C. Power of Wife to Apply for Divorce in certain Cases.—On contracting marriage, the wife is to be allowed to stipulate for certain conditions in her favour, such as, that the husband shall not marry another wife, or should divorce a previous one, or shall not transfer his residence to another city without her consent. The failure on the part of the husband to fulfil such conditions is to entitle the wife to apply for the dissolution of the marriage.

The wife may also apply to the Qadi for the dissolution of her marriage in the case of ill-treatment by her husband, which application would be granted if the facts were proved and the Qadi is unable to reconcile the couple.

When ill-treatment is not proved, and the wife still complains against the husband, the draft law provides for the appointment by the Qadi of arbitrators who are to have the double duty of inquiring into the reasons for the disagreement between husband and wife, and of trying to reconcile them. If their efforts are unsuccessful, the Qadi will grant divorce.

Other reasons entitling a woman to apply for divorce are to be :—

1. Absence of husband for over a year without legitimate reason ; and 2. Final sentence of the husband to imprisonment for three years or more, in which case the wife may apply for divorce after her husband has served one year in prison.

D. Custody of Children.—The right of a mother to custody of her children has been somewhat extended in the new draft law by the provision that she shall be entitled to the custody of her male children till they reach the age of nine years (instead of seven years as now) and of female children to the age of eleven years (instead of nine as at present).

A SURVEY OF GERMAN CASE LAW IN 1928.[1]

[*Contributed by* PROFESSOR H. C. GUTTERIDGE, LL.D.]

BY the courtesy of Professor Rabel, Director of the Institut für ausländisches Privatrecht of Berlin, Dr. Rheinstein, a distinguished member of the staff of the Institute, is furnishing the Department of International Studies at the London School of Economics with particulars of current legal events and developments in Germany. His quarterly communiqués, which relate to legislation, case law and legal bibliography, are deposited in the Schuster Library of Comparative Law, where they may be consulted by anyone desiring to take advantage of them. Space does not unfortunately permit of the publication of the communiqué as it stands, but it is thought that a brief summary of the more important judgments of the German Courts will be of interest to the general body of readers of the *Journal*. Case law exists in a much more highly developed form on the Continent than appears to be realized by English lawyers, though the Anglo-American and Continental case law systems do not function in quite the same way, as has been very clearly pointed out by Professor Lambert of Lyons in the *International Labour Review*, vol. xiv, No. 1, when discussing the sources and interpretation of Labour Law in France. It is of interest to note that English and German judges when faced with certain problems of present-day business organization have in the majority of cases come to identical conclusions in spite of differences in the legal concepts on which the respective judgments are based.

Actions against the State.—Legal proceedings against government departments are practically impossible in England, but they appear to be fairly common in Germany. A curious case was one in which an individual who had been ruined by post-war currency inflation instituted proceedings against the German Government, basing his claim on the alleged fact that the inflation was the result of mismanagement of the national finances by the officials of the Finance Ministry. It seems hardly necessary to add that the action was dismissed.[2]

Another action against the Government was, however, more successful. Damages were recovered by a plaintiff whose name had been placed in error on the lists of insolvent debtors which are kept by the German Courts.[3]

[1] The period covered is the first half of 1928.

[2] *J.W.*, 1928, p. 102. The *Juristische Wochenschrift* is referred to herein as *J.W.*

[3] *J.W.*, 1928, p. 235.

The Protection of the Personality of Individuals.—Perhaps the most interesting case decided during the period under review is that in which the ex-Emperor William sued the proprietors of a Berlin theatre for damages. The action arose out of a scene in the play *Rasputin*, by Tolstoi and Schtsegolow, in which the ex-Emperor figured together with Francis Joseph of Austria and the Czar Nicholas II and which undoubtedly presented the plaintiff in a somewhat unfavourable light. The cause of action was founded on a provision of the German copyright law (*Kunstschutzgesetz*, ss. 22 & 23), which confers on individuals the right to object to any representation of their personality, whether in ordinary pictorial form, or in the shape of living pictures. An exception is, however, made as regards pictures or other representations of an historical nature, provided that no injury is thereby caused to the person who is portrayed. The judgment of the German Court was in favour of the ex-Emperor on the ground that the representation in question was calculated to injure him, not only by reason of the fact that it served the purposes of Bolshevist propaganda, but also because the plaintiff was represented in the attitude of prayer in a blasphemous and offensive manner. The judgment of the Court repays perusal by reason of the exhaustive and careful analysis which it contains of the grounds on which an individual may suffer injury from publicity such as that to which the ex-Emperor was subjected. English law of course avoids these subtleties by dealing with the matter from the point of view of defamation, which leads one to wonder why the more direct road was not followed by the ex-Emperor and his legal advisers.[1]

The Doctrine of Respondeat Superior.—Another interesting case is one which dealt with the liability of owners of motor-cars for accidents occurring whilst a chauffeur is using a car for purposes of *Schwarzfahrten*, the German equivalent of "joy-riding." It was held that an owner is liable in such a case unless he can prove that he has done all that is possible to prevent the car from being used in this way, particularly when, as in the particular case in question, the chauffeur has only been employed for a short time. The severity of this ruling, which was justified by the Court on grounds of the safety of the public, extends far beyond that of the English Courts in similar circumstances.[2]

Constitutional Law.—A very important decision was one which had the effect of nullifying judgments of the Prussian *Oberlandesgericht* for some years past. From motives of economy the provision of the Constitution requiring the appointment of a President for each Court had not been complied with. The expedient adopted was to appoint the same person to preside over several Courts, and then to name substitutes on the ground that the original appointee was debarred from carrying out his duties. This practice was declared to be unconstitutional, and a remedial law was consequently passed.[3]

[1] *J.W.*, 1928, p. 363. [2] Cf. *Britt* v. *Galmoye* 44 T.L.R 294. *J.W.*, 1928, p. 402.
[3] *J.W.*, 1928, p. 658.

Commercial Law.—The following judgments of the German Courts will be of interest to mercantile lawyers. It has been held that the time limit for the protest of a dishonoured bill in a foreign country is to be determined by foreign law.[1] Something very much like the English law of estoppel emerges from the judgments in two cases where forged acceptances were in question. It was held that the victims of the forgeries were precluded from disputing the genuineness of their signatures, owing to their conduct which had misled innocent holders of the bills in question.[2] An agreement (the La Plata Conference Agreement), which is of the same type as the agreement which was attacked in *Mogul s.s. Co.* v. *McGregor Gow & Co.*,[3] has been pronounced by the German Courts to be valid. It was contended that it was immoral as creating an oppressive monopoly, but this argument failed, as also did a further contention that the agreement was a violation of the German Cartel Law.[4] Another case raising a question as to the validity of a Cartel agreement was one in which it was held that a Cartel was entitled to issue a circular warning its customers that if they dealt with an expelled member of the Cartel they would no longer be entitled to rebates on their purchases.[5] A case relating to a price maintenance agreement and raising similar issues to those which were before the Court of Appeal in England in *Palmolive Co.* v. *Freedman*,[6] was one in which a wholesaler had granted discounts in breach of the contract he had entered into with the manufacturer of the goods not to sell below a certain price. The German Court arrived at the same conclusion as the English Court of Appeal in refusing to treat the agreement as unlawful.[7] A case which involved the consideration of the German law as to unfair business competition was one in which a firm advertised that certain coupons entitling the holder to a money prize had been concealed by them in packets of sewing silk which were offered for sale to the public. The firm were convicted of an offence against the German lottery laws, but the civil action was brought by a trade rival in order to obtain a declaration that this method of advertising goods was unlawful. The Court held that the test to be applied was that of the conduct of a hypothetical honourable merchant, and they declared this method of transacting business to be not only immoral, but also to be a breach of the law against unfair competition.[8] It is of interest to note that the German Courts have held themselves to be incompetent to adjudicate in a case where the complaint was of the infringement abroad of a registered German trade mark. The ground of this decision was that the owner of the mark had not registered it at Berne as required by the International Conventions and ought not, therefore, to be assisted by the Court.[9] In the domain of Company Law the chief items of interest are the decisions dealing with the validity of a number of devices adopted of recent years

[1] *J.W.*, 1928, p. 639. [2] *J.W.*, pp. 396, 638. [3] [1892] A.C. 25.
[4] *J.W.*, 1928, p. 1209. [5] *J.W.*, 1928, p. 1209. [6] [1928] Ch. 264.
[7] *J.W.*, 1928, p. 1218. [8] *J.W.*, 1928, p. 1210. [9] *J.W.*, 1928, p. 1456.

in Germany for the purpose of giving banks and other bodies the right to a controlling vote at general meetings of shareholders. The legality of these expedients has been a matter of acute controversy, but it appears that the German Courts have now pronounced in favour of their validity.[1]

Conflict of Laws.—From the standpoint of Conflict of Laws, the following judgments of the German Courts during the period under review are noteworthy: (1) validity of foreign marriages[2]; (2) law governing the interpretation of contracts[3]; (3) nationalization of banks by decree of the Soviet Government in Russia.[4]

[1] *J.W.*, 1928, pp. 216, 625, 1568.
[2] *J.W.*, 1928, p. 900.
[3] *J.W.*, 1928, pp. 1196, 1447.
[4] *J.W.*, 1928, p. 1285.

ANCIENT SEMITIC CODES AND THE MOSAIC LEGISLATION.[1]

[*Contributed by* THE VERY REV. THE CHIEF RABBI (DR. J. H. HERTZ).]

THE full title of my paper is "Ancient Semitic Codes—Babylonian, Assyrian and Hittite—and their relation to the Mosaic Law." The Babylonian Code has been known for a quarter of a century ; but, to my knowledge, very little has yet appeared in this country in regard to either the Assyrian or the Hittite laws. This is not surprising when we realize that these were discovered a little more than a decade ago, and have only been edited for the first time in 1920 and 1921 respectively. An examination of these codes, therefore, and especially of their relation to the Mosaic legislation, should prove of interest to all students of Comparative Jurisprudence.

For a proper understanding of these Babylonian, Assyrian and Hittite laws, we must know something of the astounding achievements of archæology during the last one hundred years, as well as of that Ancient East which the explorers and decipherers have rediscovered for us.

Rediscovery of the Ancient East.—Since Botta's unearthing of Sargon's palace in 1843, and the final deciphering of cuneiform script in 1857, there has been a continuous archæological revelation of ancient civilizations whose very name had for ages vanished from the lips of men. An unexpected reality has been given to the mythical and fabulous East ; and the kings of Sumeria, Babylonia and Assyria, of Mittani and the land of the Hittites, seem to have come to life again. In fact, we know more of the twenty-fifth pre-Christian century in Babylon than of the fifth century in Hellas or of the third century in Rome. What would not the classical scholar give for the autograph letters of Plato or Pericles ; and yet we have the actual originals of the code of laws, the administrative orders and official letters of a King who was a contemporary of Abraham and is mentioned in the early chapters of the Book of Genesis. In all the annals of Oriental research, no event can compare in importance with the discovery of this Code of Hammurabi, the oldest document in the development of human legislation, and one of the landmarks in world history.

Mesopotamia.—The broad belt of desert stretching across Asia from the Mediterranean to the Yellow Sea is broken by a rich and fertile

[1] Paper read before the Society for Jewish Jurisprudence in the Inner Temple, March 27, 1928.

valley—300 miles long and 125 miles wide—which is the basin of the Tigris and Euphrates Rivers. Its soil is by nature very fruitful ; and it became tenfold more so when man began to regulate the water supply by means of dams, reservoirs and canals. In this region, known as " Sumir and Akkad," and later as Babylonia, there lived a people whose history, as Mr. Leonard Woolley's recent discoveries have placed beyond any doubt, goes back to a period far beyond any other known to man.

Its Early Inhabitants.—Scholars are not in agreement as to the ethnic nature of this people. Some class them as belonging to the same stock as the later Babylonians ; the majority, however, consider them to have been of Turanian stock, akin to the Chinese, and speak of them as Sumero-Akkadians or Sumerians. Thousands of years before any other people, these Sumerians built houses of baked bricks, for which the alluvial soil furnished inexhaustible material ; devised a strong family organization ; and grouped themselves into city-states.

The first schools in the world were established in Sumir and Akkad ; and the Sumerians were the pioneers in alphabetic writing, astronomy, architecture, weights and measures, and scientific irrigation. They knew the lever, the inclined plane, the arch and the dome. They calculated the periodicity of eclipses, and their division of the circle into 360 degrees, and of the hour into sixty minutes of sixty seconds each, has remained to this day. As far back as 4000 B.C., many scholars declare, when the hegemony among the many Mesopotamian city-states was held by Nippur, and then successfully by Calneh, Erech, Ur and Sippar, we find a complex society—with arts, crafts, and social grades ; with carpenters, gardeners, shepherds, weavers, metal-workers, miners, potters, boatmen, scribes, barbers, surveyors, judges, priests and wizards.

However, the extraordinary fertility of the Tigris and Euphrates valley made it the goal of invading hordes from the desert lands to the east, from the rocky plateaux of Persia and Kurdistan, whence Elamite and Kassite barbarians descended upon Babylonia. While to the west, from the arid wastes of Arabia, the cradle of the Semitic peoples, which has never been able to support its hordes of native Bedouins, waves of emigrating Arabs uninterruptedly swarmed towards the cultivated fields of Mesopotamia.

The vastest of these migrations from Arabia in historical times took place towards the year 2500 B.C. The invaders overwhelmed the country, and founded the city of Babylon in the year 2300, the city that was destined in time to become the emporium of the East and mistress of the world. They thoroughly assimilated, and immeasurably advanced, the religion and culture of the original inhabitants, and wrought a fundamental transformation in the ethnic and political life of Mesopotamia. Their language—in which they produced a literature which transcends the Egyptian in variety, depth and extent—became the medium of trade and diplomacy ; the older Sumerian tongue, however, continuing its sway in all priestly documents, like Latin in mediæval Europe.

Hammurabi, 1945–1902 B.C.—The zenith of Babylonian civilization was reached under the sixth king of the Arabian Dynasty, under Khammurabi, or Amraphel, but best known as Hammurabi, who reigned for forty-three years, from 1945–1902 B.C. He appears to have been the benevolent despot at his best. He finally united all the city-states of North and South Babylonia into one strong centralized empire; defeated the Elamites—the hereditary foes of Babylonia—and extended his rule to the shores of the Mediterranean. He calls himself "King of the Four Corners of the Earth and of the Westland (Canaan)." He encouraged agriculture, cut canals, dredged rivers and built bridges. He exterminated the robber bands that infested the country, set his face against witchcraft, and was a patron of letters. He restored and built many temples, controlled the calendar, and seems in addition to have had an interesting educational policy. Every Babylonian child had to learn Sumerian; and, on the other hand, all temple and state documents, hitherto exclusively written in Sumerian, had to be accompanied by a Babylonian translation—a sort of compulsory bilingualism, four millenniums ago. He dealt severely with all bribery and oppression on the part of his judges and officials. And as a written code accessible to the people is an indispensable condition of justice, however just the laws themselves may be, he undertook the codification of Babylonian law.

Codifies Babylonian Law.—It is now twenty-six years since this Hammurabi Code was rediscovered for the modern world. The archæologist, J. de Morgan, whilst conducting the French excavations in Persia, unearthed at the Acropolis of Susa, the capital of ancient Elam, an enormous block of diorite, measuring 7 feet $4\frac{1}{2}$ inches in height, and 4 feet 11 inches in circumference, covered with forty-nine columns of writing. Its 8,000 Semitic words, the equivalent of 20,000 in English, form the longest cuneiform inscription hitherto found. It consists of two hundred and eighty-two paragraphs, and is preceded by a Prologue and closes with an Epilogue. The Prologue is a fair specimen of the *Prunkschrift*, the boasting inscription of Oriental monarchs. Hammurabi boasts of his victories, his greatness, wisdom, love of justice and piety. He is the "shepherd of his people," and declares that the object of his promulgating the Code was "that the strong oppress not the weak, that the orphan and widow be protected."

Affords Insight into Babylonian Life.—Nothing can give us such an immediate insight into the cultural and social life of the Babylonians 3,900 years ago as this collection of laws. The more so, because it does not lay down general principles, but selects cases which exemplify them. The words of Savigny, the greatest authority on Roman law, apply here: "*Das Recht geht von der Wirklichkeit des Lebens aus*" (Law takes actual life as its starting point). And as we read its paragraphs, we catch realistic glimpses of Babylonian life; for the Code deals with the laws of witchcraft, evidence, duties and privileges of royal servants; of tenure, rents and cultivated lands, trade and commerce, deposit and prosecution

for debt; of family law, marriage settlements, divorce, inheritance, adoption, criminal law, slavery, canal-care and tariffs of wages for architects, surgeons and boatmen.

Society.—Society, in the time of the early Babylonians, presented certain definite castes: king, court and priests, men of gentle birth (aristocrats and officers), commoners and slaves. The Code of Hammurabi contains no laws for the king and very few for the priest. The privileges of the latter were no doubt well known; and the former was a semi-divine person who was above the law, beyond good and evil, so to speak, with perhaps all the gruesome privileges of the early Sumerian absolutism (which among other things demanded that the king's bodyguard and grooms and gorgeously attired women be deliberately slain round his last resting place). The Code, however, recognizes appeal to the king, and his power of pardon, and has detailed rules concerning some of the king's officers.

It is the gentleman, the commoner, and the slave, for whom this citizen's Code legislates. The difference between the social grades can be measured by various regulations. For example, where bodily injuries were compounded for by money payment, an aristocrat was equal to two commoners, and a commoner to two slaves. Likewise, where capital punishment for theft was commuted by payment, the thief had to pay thirtyfold if the theft was from the royal estate; tenfold if from a gentleman, fivefold if from a commoner. The commoner was a free man, but subject to *corvée*, and liable to be sold into slavery for debt or for crime. In case he was enslaved for debt, he regained his freedom after three years.

Slaves.—Numerous are the regulations of the Code in regard to the slave. He was merely a chattel with his owner's name branded or tattooed on his arm, and could not go beyond the city gates without a written pass from his master. A strict fugitive slave law was in operation, which, in some respects, was as harsh as the American fugitive slave law of "Uncle Tom" days. There were statutory rewards for the captor of the runaway slave, while anyone enticing a slave to escape was punished by death. Contrast with this the commandment in Deuteronomy, xxiii, 16, "Thou shalt not deliver unto his master a bondman that is escaped from his master unto thee." And yet a slave could hold property and acquire wealth, only the master had to be cognizant of the transaction and give his written licence. The slave could thus eventually buy his freedom; but if he died before doing so, his master was the heir and his children remained slaves.

If a slave married a free woman the children were free. The property which such a pair acquired since marriage was divided into two parts. One half went to the master who was the slave's heir; the other half, to the wife and the children of the slave. If a free man married a slave woman, even as a second wife, the children were free. She also became free on her master's death. The first wife, however, retained the right to punish insolence, but only by degradation. Ishmael, the son of a

free man and a bond-servant, Hagar, is free. When Hagar is insolent to Sarah, she may punish her as harshly as Abraham would permit, but she could no longer sell her.

Position of Woman.—Proceeding to family law, we note the favourable position of woman in Babylonian life. We find women as scribes, jurists, priests, surveyors and wine-shop keepers. Before marriage, a woman could become a " votary," which seems to have been a sort of vestal virgin. She would then be dowered as for marriage, with right of complete disposal of her property, or with only a life interest in it. If the property was altogether hers, she could farm it out ; or, in old age, adopt someone who, in return for a life annuity paid to her, would eventually become her heir. If only a life interest was hers, it reverted to her brothers on the father's death. In that case, they must maintain her to her own satisfaction, failing which, she could, like every unmarried daughter, demand a son's share of the estate. These votaries lived in a convent under a " Lady Superior." If anyone unjustly slandered their reputation, he was branded. If the accusation proved to be well-founded, the votary was burnt. In Leviticus, likewise, we read : " And the daughter of any priest, if she profane herself by playing the harlot . . . she shall be burnt with fire."

Marriage and Divorce.—In marriage between different social grades, the wife maintained, and her children inherited, the higher status. On her marriage, she brought a dowry to her husband's house, which remained tied to her for life. As wife, she could be witness, conduct business in her own name, and possess property which her husband's creditors could not take to pay any of his ante-nuptial debts. Embodiment of strict justice that this Code is, it contains a similar enactment in favour of the husband : *his* property could not be touched by the wife's creditors for any of her pre-marital debts.

In case of proved cruelty, the wife could divorce. And though the husband could do so without any reason, this right was limited by his being compelled to pay her double the dowry, even if she had no children. If she had children, she received her marriage portion as well as the usufruct of his estate—field, garden, goods—till the children were grown up. After that, she had a right to a son's share. Desertion on the man's part dissolved marriage ; on the wife's part, it entailed death by drowning. But the mere absence of the husband did not dissolve marriage, so long as the wife was provided for. If she was not provided for, she might remarry to get maintenance ; but she reverted to her first husband on his return. The widow could not be forced out of her husband's house by his heirs. She was the sole guardian of her children ; but she could not remarry without application to the judge who must make an inventory of the estate before granting her permission. She and her second husband then became joint-trustees of the children's estate.

Land Laws.—Land was private property, subject to an impost levied on the crop. An accurate survey of the entire land with complete in-

ventory of cattle on each estate, as well as the nature of the crop, seems to have been perfected as early as 2500 B.C. Stringent laws were in force for the proper regulation of irrigation. If a man neglected a dam and caused an inundation in the neighbouring field and could not compensate the loss, he was sold into slavery. If land was let on the share-profit system, damage done by storm was shared by landlord and tenant equally. If on the metayer system and the tenant embezzled the seed, starved, or hired out the oxen, he had to pay a heavy fine. If he was unable to do so, he was to be torn to pieces by the oxen in the field. Vast herds and flocks were owned. The shepherd gave a receipt for the animals entrusted to him, and was bound to return them with reasonable increase. He was allowed to use a certain number for food, and was not responsible for those killed by lion or lightning. Any loss due to his carelessness he had to repay tenfold. This illustrates Jacob's protest to Laban: "This twenty years have I been with thee; thy ewes and thy she-goats have not cast their young, and the rams of thy flocks have I not eaten. That which was torn by beasts I brought not unto thee; I bore the loss of it; of my hand didst thou require it, whether stolen by day or stolen by night."

Interest on Loans.—The Code also protected the Babylonian landowner when he was in want of ready money. Speculation in futures was forbidden to the moneylender, who was usually the corporation of priests or priestesses in charge of the local temple. The normal rate of interest was 20 per cent. in cash, or 25 to 33 per cent. in corn. In the case of destructive floods or other unforeseen disasters, a moratorium was declared, and no interest need be paid on the loan that year.

In commerce and trade there was the all-pervading obligation of putting every business transaction in writing, signed, sealed, witnessed and in duplicate. Accounts were carefully kept, and vouchers taken for everything. There were detailed regulations for rent; lease and lease guarantees, administrators of property, safe-deposit, warehousing; partnership, commercial travellers and agents; transport and shipping.

Wages.—Class legislation being a feature of the Code, tariffs, recalling the mediæval usage, were fixed for various classes of labourers, ox-drivers, harvesters, veterinary surgeons, ship-builders, boatmen and branders. The physician's fee was fixed according to the social grade of the patient; the builder's according to the size of the house. Though architecture tended towards the vast and the colossal, there seems to have been a great deal of jerry-building in Babylonia. In case of accident, the builder suffered the same damage in his person as he had brought on the house-owner.

Judicial Procedure.—We are not informed as much as we should like to be in regard to legal procedure. A few things though are certain. If the judge once gave his judgment, it was irrevocable by him. If he altered it he was deposed, and had to repay tenfold the penalty he had inflicted. The plaintiff pleaded his own cause, as there were no professional advo-

cates. Perjury of witnesses in a capital suit was punished by death; in a civil suit, by the payment of the damages in that suit.

The strong centralization of the Government had resulted in the total suppression of the vendetta, and blood revenge. Still some remnants of lynch law are left. Par. 25 reads: "If in a man's house a fire has been kindled, and the man who has come to extinguish the fire steals from the property of the owner of the house, that man shall be thrown into the fire." In one important branch, even trial by ordeal remained. Thus, if any man had charged another with sorcery, the accused went to the holy river. If he sank, the accuser took his house; if, on the other hand, the holy river saved him, the accuser was put to death and his property went to the accused. The same subject is dealt with in the opening paragraph of the Code: "If any man make a charge of black magic against another, and cannot justify it, the accuser shall be put to death."

Severity of Code.—We are struck in this Code by the slight value placed on human life. Horrible mutilations abound—of eyes, ears, tongue and hand; and there are thirty-four crimes for which the death penalty is inflicted; among these every form of theft, including receiving and buying from servants. It is well, however, to compare with this list and the horrible forms of death prescribed, the exceedingly cruel modes of execution in European countries down to quite modern times. Even in England, pocket-picking was punishable by death till the year 1808, and sheep-stealing until 1832! Nowhere as much as in the appraising of various cultures, must we beware of using divers measures and divers weights.

"Higher Criticism" of Code.—Much more interesting than the examination of the detailed regulations of the Code are the questions connected with what we might call its "higher criticism." Is it the product of one mind or is it the precipitate of many ages? Again, being the oldest code of laws in the world, what are its influences on younger codes, its traces, in other words, in the history of civilization?

These laws, of course, were not invented by Hammurabi; it is absurd to look upon the times before him as a period of anarchy. Besides, there is no such thing as starting with a clean slate in law. Every new order must graft itself on the past, must connect itself with the civic institutions that had hitherto shaped the people's life. Writing down the laws, fixing the customary law in legal shape, of course carried some reforming with it. And indeed this Code is but the amalgamation and adaptation of widely distinct systems of varying antiquity and ethical worth. For unfortunately in Mesopotamia, as in the Nile Valley, though men were always learning, they rarely forgot anything! In Egypt, for example, the most exalted religious ideas were reached, but the crude animal-worship of prehistoric times was not discarded. In Babylonia, likewise, justice came in time to be recognized as the true aim of the legislator; but he had to take over, practically without modification,

the entire legal heritage of the past, with much of its Draconian severity.

Moses and Hammurabi.—So much for the juristic evolution of the Code. As for the comparison with other systems of legislation, and the question of its relationship to the Mosaic Law, though much has been written on this subject, it still forms an important problem in Comparative Jurisprudence. Research in this important field began in Germany at the beginning of this century with the Babel-Bible lectures of the late Prof. Friedrich Delitzsch, under the auspices of the ex-Kaiser. It is now recognized that some of the stories of the Patriarchs can be fully understood only in the light of Hammurabian family and shepherd law. We have seen this to be the case in the Sarah-Hagar incident ; likewise, the complaint of Jacob against Laban is in strict conformity with sections 261 to 267 of the Code of Hammurabi. And as for the legal portions of Exodus, Leviticus, and Deuteronomy, though no feature can be definitely singled out as derived from Code Hammurabi, there are some twenty-four instances of analogies and resemblances between the two Codes. This is so in regard to the laws of kidnapping, burglary, deposit, assault, and various others ; and especially in the *Lex Talionis*—life for life, eye for eye, tooth for tooth. Now, it is argued, in view of the fact that the Mosaic Law is at least 400 years the younger of the two, these resemblances constitute overwhelming evidence that the Hammurabi Code is the immediate or the remote source of the Mosaic civil and criminal legislation.

Many scholars, however, challenge the correctness of this inference. Common laws—they maintain—are often due to common human experience, which is much the same everywhere. The history of the Patriarchs, they grant, has a Babylonian background, but this is so because they were of Babylonian descent. Abraham came from Ur of the Chaldees, a favourite city of his contemporary Hammurabi. All of them, Abraham, Isaac and Jacob, lived in Canaan, and this, the " Westland," was then under Babylonian sway.

Differences.—The Mosaic Law, however, is in no way indebted to the Babylonian. For, if the Babylonian law were the source of the Pentateuchal legislation, it would be absolutely inexplicable why there are no Babylonian loan-words in its legal terminology. A higher culture always forces its use of language upon a primitive people which adopts that culture. Again, laws as the peculiar formulæ of the life of peoples, can only be imported where there are related habits of life, similar social conditions, and a like economic society. Israel is the least Babylonian of the peoples. It is nomadic, rural, primitive ; whereas Babylon has an intricate, highly industrialized, commercial city-civilization. In Israel, the people is in possession of sovereign rights ; the king is under the law. In Babylon, as a recent Schweich lecturer pointed out,[1] a limited monarchy would have been deemed a contradiction in terms.

[1] Prof. T. H. Robinson, *Palestine in General History*, 1926.

In Israel, the death penalty for property crimes is abolished; and the fine for theft is the same whether the theft be from king, noble, commoner or slave. The slave is considered a human being. He is to go free for the loss of an eye, or even a tooth, at the hands of his master. The Babylonian Code closes with the case of the slave whose ear is to be cut off for desiring freedom; whereas the Mosaic civil law (Exodus, xxi, 2–6) opens with the case of the slave whose ear is to be bored as a mark of disgrace for refusing to go free when his six years of servitude are at an end. Literally, he that is last in the kingdom of Hammurabi, becomes the first object of care in the Hebrew commonwealth.

Lex Talionis in Mosaic Law.—Nothing, however, illustrates the fundamental difference between the two legal systems of these two peoples better than the varying applications of the *Lex Talionis*. The enunciation of the principles of "Life for life, eye for eye, tooth for tooth," is to-day recognized as one of the most far-reaching steps in human progress. It means the substitution of legal punishment, and as far as possible the exact equivalent of the injury, in place of revenge and wild private resentment. The spirit of taliation is the spirit of equity, "measure for measure." St. Augustine was one of the first to declare that taliation was a law of justice, not of hatred; one eye, not two, for an eye; one tooth, not ten, for a tooth; one life, not a whole family, for a life. Of course, the great danger consisted in this principle petrifying into an iron rule of terrible cruelty. In the Mosaic Law, however, money-compensation had, it seems, already begun. This is seen from the Pentateuchal prohibition of accepting money-compensation for malicious murder. "Ye shall take no ransom for the life of a murderer" (Numbers, xxxv, 31). In Rabbinic law, the literal application of "eye for eye, tooth for tooth" was categorically ruled out.

Quite different is the place which this primitive principle holds in the Code of Hammurabi. The whole Code seems to be built on it; and instead of being a general maxim merely, as in Hebrew jurisprudence, it is here taken literally and translated into cold prose, *e.g.* "If a man has caused the tooth of a man who is his equal to fall out, one shall make his tooth to fall out"; and similarly in fourteen other cases. It is true that here likewise the beginning of money-compensation appears; but not for the aristocrat or free-born, only for slaves.

"Son for son, and daughter for daughter" in Code Hammurabi.—Furthermore, the taliation principle is extended and carried to grotesque extremes. For example, if the jerry-builder, by his faulty constructing of a house, causes the death of the owner, the jerry-builder is killed; but if he causes the death of the son or daughter of the owner, then not the jerry-builder, but *his son or his daughter* is killed! This explains a passage in the Mosaic civil code which no one could ever explain till the discovery of the Hammurabi Code. In Exodus, xxi, 28–31, we read:

If an ox gore a man or a woman that they die, the ox shall surely be stoned but the owner of the ox shall be quit. But if the ox were wont to

gore in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned and his owner also shall be put to death. If there be laid on him a ransom, then he shall give for the redemption of his life whatever is laid upon him. Whether he have gored a son or have gored a daughter, according to this judgment shall it be done unto him.

Now, what is the meaning of this last clause? Prof. David Mueller,[1] whose treatise on the Code is by far the best and most scholarly, reminds us that in the pre-Mosaic age, if a goring ox killed a man, the owner of the ox was killed; if, however, he killed a son or daughter, not the owner of the ox, but his son or his daughter was killed. By this one unobtrusive clause, "Whether he have gored a son or have gored a daughter, according to this judgment shall it be done unto him"—the Mosaic Law sweeps away an infamous caricature of human justice. And that its meaning be for ever unmistakeable, it again elsewhere declares (Deuteronomy, xxiv, 6), "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers. Every man shall be put to death for his own sin."

Indirect relation only.—Now these differences, more baffling though they may be than even the resemblances, certainly do away with the notion that Code Hammurabi is the source of the Mosaic Law; and the best authoritative opinion to-day indeed holds that the Mosaic Civil Law and the Hammurabi Code stand merely in an indirect relation to each other; that the Mosaic Law, though younger in years, is far more primitive, archaic, older in form than the Hammurabi Code; that these two systems exhibit independent codifications of ancient Semitic Common Law. To the usages common to the ancestors of both, Babylonians and Hebrews, the greater number of the resemblances in the two legislations are due. It is this common element which in Babylon was developed into the Code of Hammurabi; but which in Israel was sifted and transmuted in such a way as to include love of stranger, protection of slave, the Ten Commandments, and the law, "Thou shalt love thy neighbour as thyself" (Leviticus, xix, 18, 34).

Assyria.—These considerations as to the independence and interdependence of the Babylonian and Israelite systems of legislation will likewise illumine for us the problems that arise out of the analogies, similarities and dissimilarities between the recently discovered Assyrian and Hittite codes, on the one hand, and the Mosaic Law on the other. To begin with the Assyrian Code. Here too we must know something of the ethnic and geographic background, if we would understand these laws. Assyria was a garrison province of Babylon in the northern uplands of Mesopotamia—modern Kurdistan. The Assyrians were a branch of the Babylonians, their language and method of writing, their literature, religion, and science were all taken from Babylon. In

[1] D. H. Mueller, *Die Gesetze Hammurabis und ihr Verhältniss zur mosaischen Gesetzgebung sowie zu den XII Tafeln.* Vienna, 1903.

1275 B.C. they conquered Babylon and embarked on a course of world-dominion. For over 500 years thereafter, they terrorized the inhabitants of Western Asia. The Hebrew Prophets, their contemporaries, speak of them as " a fierce people "—a fitting epithet for a nation whose history is a perpetual warfare, with whom the practices of torturing prisoners and impaling the defenders of a captured city were almost universal. It has been well said that not even Rome practised *Realpolitik* with the callous fanaticism, the sheer indifference to humane pretences, which mark Assyrian warfare and, still more, Assyrian " pacification."

Cruelty of Code.—This spirit is faithfully reflected in the fragments of the Assyrian Code which the German excavations on the site of ancient Assur have now brought to light. These fragments have been edited in 1920.[1] They date from the thirteenth pre-Christian century ; and, though they contain only a paraphrastic commentary of the Code instead of the original Code itself, they give considerable legal information, especially concerning Assyrian family law and the laws of property. Cruel and cumulative punishment is the characteristic feature of this Code. One crime, one punishment, was the rule in Israel. One crime, many punishments, seems to have been the rule in Assyria. The Mosaic Law, in sharp contrast to the harsh treatment accorded to offences against property in all primitive societies, required restitution, four or fivefold, of the object stolen. In the Assyrian Code, a single offence against property may be visited by money-fine, ten to thirtyfold the value of the object stolen, accompanied by blows, mutilation and *corvée*. Still more remarkable is the provision that if a widow steals from her husband's estate and hands the stolen article to another, both must die. If the husband is alive, he may pardon one of the offenders provided he also pardons the other, otherwise both must suffer the same punishment. If the wife hands the stolen property to a slave, his nose and ears are cut off, and the husband has the right also to cut off *her* nose and ears, and for the stolen property full restitution must be made. If he releases his wife, then also the slave's ears shall not be cut off and they need not make restitution for the stolen property. " Cutting off of nose and ears " occurs with nauseating frequency, and is typical of a whole series of punishments—castration, impalement and public exposure—whose intention is both to humiliate the offender and to inflict torment.

Alongside the husband's full patriarchal jurisdiction over the wife, there existed a matriarchal form of marriage, with the wife living in her own or her father's house, and the husband visiting his wife. (Cf. Judges, xv, 1). Nevertheless wife and daughters are to go about veiled, to mark them as the property of the father or husband. Severe punishment awaits the temple votary and the harlot if *they* appear veiled in public. To the rightlessness of the wife in matters of property, there is one

[1] Morris Jastrow, " An Assyrian Law Code," in *Journal of the American Oriental Society*, February 1921.

exception. The bridal price, the Hebrew *mohar*, remains the absolute property of the bride. Levirate marriages take place after betrothal even, so long as the *mohar* had been accepted. The father of the deceased may give the girl to another of his sons ; and if the dead man had a son from a former marriage, who was at least ten years old, that son married her. If the girl dies, her sister takes her place ; and if this is impossible, the *mohar* must be returned. Adultery is considered an offence against the property rights of the husband. If evidence has established that the offender knew the woman to be married, the husband retains full jurisdiction as to the punishment or pardon of the man and the woman ; but whether he metes out death, mutilation or pardon, it must be the same for both.

Woman, however, is not altogether unprotected. A false accusation against a woman's reputation is visited by blows, mutilation, fines and *corvée* ; and provision is made for the care of the widow. Sons are bidden to support their widowed mother, and they should do so tenderly as one treats " a bride whom one loves." The husband's power to divorce is unlimited ; but in case of desertion, the wife is at liberty to remarry after five years, and sometimes even after two years.

Evidence.—The law of evidence is well developed ; but in a criminal case, it is not the accused but the accuser who must take an oath. Three times is ordeal prescribed in the portions of the Code that have come down to us. Thus, in case of doubt as to the accused adulterer having known the woman to be married, he is thrown into the river ; and if he does not *sink*, he is guilty. Witchcraft is a capital offence ; likewise, the silence on the part of one who knows of witchcraft and does not report it. There are also in the Code of this militarist people, bizarre and unquotable applications of the law of taliation. In regard to debt, persons may be given for security, especially children. Through ill-treatment of the debtor, the creditor loses his rights. The law, however, allows mild ill-treatment of the debtor—such as stripes and the boring of ears.

The Hittites.—Quite different is the latest of the ancient codes to be rediscovered in our day—the Hittite Code. The Hittites were long held to be insignificant tribes that were scattered over Syria throughout the second millennium before the Christian era, whose peaceful penetration and admixture with the population was especially marked in Southern Palestine. Thus, Abraham negotiates with the Hittites for the purchase of Machpelah ; and Ezekiel taunts Jerusalem in the words : " Thy father was an Amorite, thy mother Hittite." Recent excavations in Asia Minor, however, have taught us that nearly four thousand years ago, the Hittites formed a federal Empire of many peoples and divers languages. More than once, they raided Babylon and caused the gravest anxiety to Egypt. In 1907 Prof. Hugo Winckler unearthed at Bhogazkoei, some 100 miles east of Angora, what proved to be the archives of the Palace in the ancient capital. These archives included hymns and prayers, legends, chronicles, diplomatic correspondence,

medical texts and also fragments of the legal Code.[1] The problems of deciphering the half-barbaric, cuneiform alphabet in which these texts were written and of deciding the nature of the Hittite language, seem finally to have been solved in 1922, in which year Prof. Hrozny of the Czech University of Prague published the Code in transliteration, accompanied by a French translation. Unlike Sayce and Cowley, who are inclined to assume a Semitic substratum for the Hittite tongue, he declares it to be Indo-European. Even if this should eventually prove to be the unchallenged verdict of philologic science, the Hittite Code would still remain a Semitic Code, and fall within the scope of this paper. For whatever may be the racial or linguistic affiliations of the Hittites, culturally they formed part and parcel of the ancient Semitic world—even as the Turanian Magyars, for example, are part and parcel of the Indo-European world.

A striking feature of this Code, which in its present form was edited *circa* 1350 B.C., is that it frequently differentiates between the law as it is " now " and as it was " formerly " ; and that the later regulations are, as a rule, the milder of the two, money-fines being usually reduced to half, and harsher punishments replaced by an exhaustive tariff of money-fines. This change of punishment has variously been explained as the result of social evolution or of dynastic revolution. Another peculiarity is that the punishment for a crime often differs according to the province of the Empire in which it was committed—in consequence no doubt of the federal nature of the Hittite State.

Criminal Law.—Be that as it may, the death penalty is rarely inflicted —only for sacrilege, sodomy, adultery and witchcraft on the part of a slave. Unlike the Biblical conception, murder is not deemed as defiling the land and people ; and it is not therefore always punished by death. The opening two paragraphs of the Code read : " If anyone deliberately slays a man or a woman, he must give up the body, also four persons male or female of his household ; then his guilt is cleared. If anyone deliberately slays a male or female slave, he must give up the body, and also two persons of his household ; his guilt is then cleared." In unintentional homicide, the punishment is one-half of that prescribed for murder. Kidnapping *of* a Hittite is punished by the confiscation of the whole household of the criminal ; kidnapping *by* a Hittite, " formerly " required the giving up of twelve persons by the kidnapper ; " now " only six persons. (In the Mosaic Law this heinous crime of man-stealing is invariably visited by death.) A crime against a slave involves only one-half the punishment meted out for the same crime to a free man. Notwithstanding this limitation, the slave is deemed to be a *person*, and is not a mere thing, as he is regarded in the Assyrian and Babylonian Codes. Theft or incendiarism by a slave, however, is accompanied by mutilation, and there is a reward for him who restores a fugitive slave to his owner.

[1] Heinrich Zimmern, *Hethitische Gesetze*, Leipzig, 1922. Friedr. Hrozny, *Code hittite provenant de l'Asie Mineure*, Paris, 1922. Emanuel Ring, *Israel's Rechtsleben im Lichte der neuentdeckten Assyrischen und Hethitischen Gesetzesurkunden*, Leipzig, 1926.

Family Law.—In family law, we find great legal importance attaching to betrothal. There are intricate provisions for money-fines and return of *mohar* in all manner of " breach of promise " contingencies, if either side, or the parents on either side, refuse to proceed to marriage. Marriage between a slave and a freeman or freewoman is valid ; and in case of divorce in such mixed marriages, the slave partner is entitled to one child. In adultery, if the crime is " in the mountains " it is assumed that the man used force, and he alone is to be put to death. If in the city, both must die. The husband can take summary vengeance on the offenders ; or he may take them to the gate of the Palace, and declare that he desires to spare the life of his wife. In that case, he must also spare the man's life, though he may make him his slave. Aside from adultery and sodomy, this Code displays amazing leniency towards incestuous and unnatural abominations, so long as they are committed with mutual consent.

Thus there is not a trace in the Hittite Code of the Biblical ideal of personal holiness. There does not seem to have been any realization that these abominations are offences against morality and an outrage on human dignity. Neither do we meet in the secular codes of Babylon, Assyria or the land of the Hittites with commandments concerning beneficence, nay, chivalry to the poor and needy, which characterize the Mosaic legislation.

Mosaic Law v. Babylonian, Assyrian and Hittite Codes.—With all their analogies of legal enactment and terminology as to rape, injury to a pregnant woman and similar offences, which cases and legal phrasings were, so to speak, " in the air " in the Semitic East of hoary antiquity, these three Codes differ from the Israelite Code in spirit, outlook and method, as well as in the degree of legal evolution and the manner of society for which they were each intended. Perhaps in no respect is the abyss between these resurrected codes and the Mosaic Law deeper than in their attitude to human freedom. The words spoken by Henry George in 1884 still hold good:

> The Hebrew commonwealth was based upon the individual—a commonwealth whose ideal it was that every man should sit under his own vine and fig-tree, with none to vex him or make him afraid ; a commonwealth in which none should be condemned to ceaseless toil ; in which for even the bond slave there should be hope ; in which for even the beast of burden there should be rest. It is not the protection of property but the protection of humanity, that is the aim of the Mosaic Code. Its Sabbath day and Sabbath year secure, even to the lowliest, rest and leisure. With the blasts of the jubilee trumpets the slave goes free, and a re-division of the land secures again to the poorest his fair share in the bounty of the common Creator. The reaper must leave something for the gleaner ; even the ox cannot be muzzled as he treadeth out the corn. Everywhere, in everything, the dominant idea is that of our homely phrase, " Live and let live."

Varying Influence of Four Codes.—As to the influence of these various Codes on the legislations of later ages, all trace of both the Assyrian and

of the Hittite laws was lost with the destruction of these Empires. It is otherwise with Babylonian and Biblical law. Woodrow Wilson has called attention to the potent leaven of Judaic thought in the legislations of the Western peoples throughout the Christian era. "It would be a mistake," he writes, "to ascribe to Roman legal conceptions an undivided sway over the development of law and institutions during the Middle Ages." And as to the Hammurabi Code, comparisons have been instituted between it and the Hindoo Laws of Manu and the laws of the West Goths; and its abiding influence has been shown on the Armenian and Syro-Roman law books. Prof. D. H. Mueller even undertook to demonstrate that the wording and the grouping of many of the cases dealt with in the Roman Law of the Twelve Tables bear such notable resemblance to the wording and order in Hammurabi as altogether to preclude pure accident. He instances the laws concerning *furtum*, burglary, the felling of trees, the *talio*, the case of the incendiary, and of the thief caught in the act, as elements which present formal similarities in the two Codes. (The word "*rupitias*" in "*si rupitias faxit, noxiam sarcito,*" Table VII, for which no altogether satisfactory explanation has been found, he showed to be a Semitic loan word actually used in the Semitic parallels.) The Roman tradition which declares that the Twelve Tables were derived from Greece is in a line with this theory, as all Greek legislation goes back to Asiatic influences. It was also the opinion of Jhering, the great authority on Roman Law, that for the ultimate solution of the puzzles of Roman Law we should have to go back to Babylon.

Conclusion.—In conclusion, one thought must impress itself on every mind pondering over the monuments of early human culture which we have considered this afternoon; and that thought is, Wisdom is not of yesterday! Our inherited ideas and pet theories as to the Ancient Orient badly need revising, if not reforming altogether. "We must rid ourselves of the notion," writes Prof. Baentsch of Jena, one of the foremost of Biblical scholars of the age, "that the pre-Mosaic age in Israel was barbarous or semi-barbarous with animistic tree, stone and ancestor worship; with fetishism, totemism, witchcraft, and other such beautiful things. To-day we know that the age of Abraham was the outcome of a religious development that goes back many, many thousands of years." Verily, the horizon of human history has been widened by millennia; and the evolutionary view of history, the view which holds that progress is always in a straight line, is seen to be both fatalistic and false. Progress is far more often in a zigzag line; and periods of decline like the post-Homeric age in early Greece, or the barbarous period of the Judges of Israel, can no longer be used to disprove the possibility of the creative epochs that preceded them. For there are ebb and flow tides in the history of the human spirit. This, I believe, may be taken as one of the incidental results of a consideration, such as ours has been, of Ancient Semitic Codes and the Mosaic Legislation.

THE CODE NAPOLÉON AND THE MODERN WORLD.[1]

[*Contributed by* Sir Maurice Amos, K.B.E.]

Introduction.—An armistice seems in our generation to have suspended the classic controversy in this country as to the best form of the law.

The opponents of a code would seem to have safely entrenched themselves behind lines as impregnable as those of Torres Vedras ; and when, if ever, they deign to look over their parapets towards the last bivouacs of the codifiers, it is with the confident expectation that no long time will have passed before the enemy will have withdrawn his rearguard beyond the horizon. I am very sensible that it would be vain at the present time to come forward, in any assembly convened for the discussion of practical measures, as an advocate of far-reaching plans for the codification of the law of England. But a discourse which would be listened to with impatience in a party caucus may not be out of place within the precincts of a university ; and if what I have to say to-day is of the nature of a tribute to a great code, there could be found no more fitting place for such testimony than within the walls of this college, which, in a very special sense, is identified with the names of Bentham and of Austin.

Let me, however, hasten to say that it is not my intention, indeed I have not the presumption, to undertake an argument in favour of the principle of codification. I intend only to report facts of recent history and contemporary tendencies. Codification is going on all over the world ; it is one of the great activities and vehicles of civilization ; it is, then, surely desirable that we should take notice of it ; and I wish to commend the reflection that if we desire to devote to this specific form of intellectual and practical activity the study which it deserves, to observe what it implies, and to consider its consequences, we cannot do better than to examine the history of the *Code Napoléon* subsequent to its promulgation. This code is the oldest general code of civilized law now in force in the world ; it is 122 years since it was put into effect ; and it will, I hope, prove interesting to see both how it has fared in its own home, and what influence it has exercised in the world outside France. The two topics, therefore, to which I shall particularly invite your attention this evening will be, first, the history of the *Code Napoléon* in France itself from the time of its promulgation in 1804 till the present day ; and, secondly, the spread of its influence in other coun-

[1] A public lecture delivered at University College, London, on November 29, 1926.

tries. It is very evident that in the brief time at my disposal two such extensive subjects can be treated only in a very superficial manner. Nevertheless, it will, I think, be useful if I make one or two remarks of a prefatory character.

Promulgation of the Code Napoléon.—In the first place let me say a word or two by way of explanation of what the promulgation of the *Code Napoléon* meant for France ; for it is possible both to over-estimate and to under-estimate its revolutionary character and its momentousness as a turning-point in the history of French law. Let us suppose that the Duke of Wellington had done what Napoleon confidently expected he would do, and that he had seized the supreme power in England, and made himself a second Cromwell. Let us then suppose that he had employed Lord Brougham and Sir Samuel Romilly to prepare an English Civil Code based upon Blackstone's Commentaries, subject to two governing instructions, namely, that all traces of ecclesiastical authority on the one hand, and of feudal institutions on the other, were to be wholly eliminated from our private law. This would have been a highly revolutionary proceeding ; but, as a first approximation, it gives a fair idea of what the promulgation of the *Code Napoléon* meant for France. To make the analogy more complete it would be necessary to suppose that the Code Wellington, prepared in London by radical London barristers, overruled and repealed the whole law of Scotland, and all local customs and local statutes throughout the United Kingdom. This imaginary hypothesis gives, as I say, a fair picture, to a first approximation, of what was accomplished in France by the promulgation of the Civil Code. The law of the whole country was unified, laicized, democratized and simplified.

It is, however, necessary to correct the picture in two respects. In the first place it must be remembered that the Code came at the end and not at the beginning of fifteen years of Revolution. The most sweeping of the changes in the law of France which it incorporated had been effected in an atmosphere of tumult by the *Assemblée Constituante*, the *Assemblée Législative*, the *Convention* and the *Directoire*. It has been said that Napoleon made the Revolution respectable ; and with equal truth we may say that the Code summed up its permanent achievements.

The second thing that has to be remembered is that codification was not an invention of the Revolution : it seems rather to be a natural expression of the genius of the French people, who had been busily engaged for three centuries before the fall of the Bastille upon the congenial task of getting their law into an orderly shape. Practically all the provincial customs had been codified, and many of them more than once, by the end of the sixteenth century. In the second half of the seventeenth century and the first half of the eighteenth century the Chancellors Colbert and d'Aguesseau had promulgated uniform laws for the whole kingdom which in form and extent constitute veritable

codes of the topics to which they relate. Nevertheless, however easy it may be for legal historians to trace the sources of every provision of the *Code Napoléon*, in the Custom of Paris, in d'Aguesseau's Ordinances, or in the pages of Pothier, there is no disputing that the promulgation of the Code shut the door upon the past, and this largely because it was universally agreed and intended by the French people that this should be so; only at this price could the achievement of national unity be made secure. So strong was this feeling that the Code must be treated as *res nova* that one of the early commentators, Bugnet, said, "I know nothing of civil law; I only teach the *Code Napoléon*." This fear lest the past should slink back again by a side-door explains Napoleon's remark *mon code est perdu* when he heard of the publication of the first commentary. And it is remarkable to-day how rarely in the application and interpretation of the French Code, the attention of the judge is invited to any legislative text or judicial decision prior in date to 1804.

Nature and Effect of a National Civil Code.—There are current in countries which, like our own, have not thought fit to codify their law, two opposite but equally one-sided conceptions of the nature and effect of a national civil code. One is that this form of legislation checks the natural development of the law, and freezes it into a cold immobility; and the other is that codification is a mere matter of convenience in arrangement; the only difference, it is suggested, between a code and a collection of Statutes is that the alphabetical index plays a more important part in the latter than in the former. The truth lies between these two views. In the countries which have specialized in this subject a code is regarded as being neither immutable nor as being a mere digest of statute-law up to date. The specific mission of a code is to emphasize principles: and there can be no doubt that the wealth of the French Code in statements of principle, expressed in lapidary language, has been one of the potent causes of its world-wide influence. Style is a powerful force; and it is related that Stendhal made a practice of reading a chapter of the *Code Napoléon* before sitting down to write, in order that he might attune his mind to the cadences of its short and limpid sentences. Here are some examples: *Les époux se doivent mutuellement fidélité, secours, assistance.*[1] *L'enfant à tout âge, doit honneur et respect à ses père et mère.*[2] *La promesse de vente vaut vente lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix.*[3] *On ne peut vendre la succession d'une personne vivante même de son consentement.*[4] *Celui qui ne peut aliéner ne peut renoncer à la prescription acquise.*[5] *Les actes de pure faculté et ceux de simple tolérance ne peuvent fonder ni possession ni prescription.*[6]

French Code as Model.—These propositions, which I have selected at random, are by no means always as profound as they are elegant.

[1] C.C. 212. [2] C.C. 371. [3] C.C. 1589.
[4] C.C. 1600. [5] C.C. 2222. [6] C.C. 2232.

The dictum of Art. 1599 that *la vente de la chose d'autrui est nulle*, which has created an endless pother in both hemispheres, is now generally voted to be merely stupid. Nevertheless, while many obvious influences have concurred to commend the French Code as a model to the Latin world on both sides of the Atlantic, in explaining the secret of its prolonged vitality and contagious influence in Germany, a high place must undoubtedly be given to the satisfaction which it has afforded to the honourable German appetite for first principles. The position of the *Code Napoléon* as a body of law having an authority in some way superior to that of ordinary law, while—I was going to say of course, but I prefer to say possibly—falling short of that of the Constitution, may be illustrated by a remarkable institution of the public law of the Argentine Republic, the Civil Code of which country is based to a very large extent upon the *Code Napoléon*. Art. 67 of the Argentine Constitution, which deals with the legislative powers of the Congress, is interpreted, as I understand it, to mean, *inter alia*, that while the Congress has power to alter the Civil Code, to repeal or amend any of its articles, it can only do so if it does so expressly. Any law which does not expressly purport to alter the Civil Code, but which can be shown to be in fact incompatible therewith, is held to be *pro tanto* void and of no effect. One must suppose that the effect of this truly remarkable rule must be to compel the legislator, whenever he is tempted, wittingly or unwittingly, to trespass on a principle to make an open declaration of war.

So far as my information goes, no similar rule exists in any other country. Nevertheless, I believe it to be the case that in a parliamentary discussion in any one of the countries which possess a Civil Code on the French model—and for this purpose I include Germany and the countries which in recent years have preferred to follow her lead—it would be, though not a conclusive, still an effective argument against a proposed legislative measure to demonstrate that its provisions conflicted with the principles of the Code.

Let me observe at this point that the impression which prevails in England to the effect that in interpreting the Code the French Courts do not recognize the doctrine of *stare decisis*, and are not influenced by the authority of precedent, is greatly exaggerated, if indeed it is not truer to say that it is simply mistaken.

In point of fact great respect is paid in France to the authority of decided cases; indeed it is sometimes said that things have come to such a pass nowadays that counsel no longer need to display any knowledge of legal principle, since all that the judges will listen to is an exposition of the *jurisprudence*, as it is called; and to aid him in this task the French advocate possesses not only the reports, but numerous editions of annotated Codes and a digest of head notes on the analogy of Mr. Mews's valuable compilation.

The great collections of French reports, with their admirable signed

critical notes by lawyers of distinction, undoubtedly play an important part in maintaining and extending the prestige of French law throughout the world. The Germans, it may be remarked, have frequently acknowledged the superiority of the French in this respect.[1]

Changes in the Code Napoléon.—I will now pass on to give some account of the changes which the *Code Napoléon* has undergone during the century and a quarter which has elapsed since it came into force. These have been, as might be expected, sufficiently numerous ; and they have been effected partly by the explicit amendment, repeal, or interpolation of clauses ; partly by the effect of general legislation of a supplementary character *in pari materia* ; and to a considerable extent by the effect of judicial interpretation.

I cannot, of course, on this occasion, attempt an encyclopædic review of the results accomplished by these different methods ; I shall perforce confine myself to a few illustrations and generalities.

Amendments and Repeals.—And first for amendments and repeals. The Code consisted originally of 2,281 articles ; of these 323, or approximately 1 in 7, have been repealed, amended, or added to. And here we may notice an interesting circumstance, which throws a remarkable light upon the great preoccupation of French opinion during the last hundred years with the organization of the family. More than two-thirds of the articles amended or repealed are to be found in the first Book of the Code, the Book which deals with the family law—with marriage, divorce, adoption, guardianship, emancipation and interdiction. Of this book more than half the clauses have been reconsidered by the French legislature.

Divorce.—On the subject of divorce the French people have changed their minds three times since 1789. Before the Revolution the authority of the Canon law, which did not recognize divorce, prevailed. In 1792, the *Assemblée Legislative* established divorce on a very wide basis, recognizing mutual consent and incompatibility of temper as grounds for dissolving marriage, with the result that in a short time, in Paris, the number of divorces exceeded the number of marriages.

This state of things alarmed even the most fervent apostles of liberty, and the Civil Code, while retaining the institution, reduced the grounds of divorce to four, of which mutual consent, elaborately regulated, was one. In 1816, as an immediate consequence of the Restoration, the severity of the Canon law was restored, and divorce remained unknown to French law until 1884. The law of that year restored the original provisions of the Code, but established the complete equality of the sexes, and omitted divorce by mutual consent. The French take a great interest in the law governing surnames, which are regarded as constituting a species of incorporeal property, like heritable titles of

[1] It must, however, be conceded that, judged by English standards, the best French judgments are apt to appear somewhat jejune. They seldom contain what we are accustomed to expect in the way of exposition of the facts, nor do they constitute an explanatory statement of the circumjacent law.

honour with us; and by a law of 1893, incorporated in the Code, it is expressly provided that *par l'effet du divorce chacun des époux reprend l'usage de son nom.*

It is interesting to note that the original provisions of the Civil Code in respect of divorce have remained unaltered in Belgium during the whole period under review.

Marriage.—But while restoring divorce to the Code, the French legislator has been concerned to remove certain obstacles which the Code itself had put in the way of marriage.

A law of 1904 repealed the provision which prohibited marriage between the respondent and the co-respondent to a divorce suit. The rules with regard to parental consent have been alleviated. It is no longer necessary for a man to have reached the age of five-and-twenty before he can marry without his parents' consent; since the year 1907 he has been able to do so on attaining his majority. The same law attenuates the rigour of the Code in respect of the acquisition of the residential qualification necessary for marriage.

Nevertheless, the formalities which have to be observed in order to get married in France continue to be burdensome; the authors of the Code were dominated by the sentiment that marriage is a matter which concerns the families of the contracting parties at least as closely as those parties themselves.[1] There are thirteen different certificates which it may be necessary for the parties to produce before the registrar. The result is that, as one writer has said, "Thanks to the authors of the Civil Code, marriage is a luxury."

Illegitimate Children.—The harassing regulations governing marriage doubtless afford one reason why the French legislator both in the Code and by subsequent amendments, has found it necessary to give so much attention as he has done to the illegitimate family. Not only did the Code recognize and facilitate the legitimation of illegitimate children, but it regulated with considerable precision the status of the illegitimate child who had been merely recognized by his father. He is subject to the *patria potestas* and is entitled to bear his father's name; he requires the same parental consent for marriage or adoption as does the legitimate child; both parties are subject to the reciprocal obligation to support (*l'obligation alimentaire*); and finally the *enfant naturel reconnu* has the rights of an heir. But under the Code none of these consequences arose unless the father had voluntarily acknowledged his paternity.[2] The child was wholly precluded from establishing his parentage by legal proceedings. *La recherche de la paternité est interdite*, said Art. 340; and the repeal of this clause, only sixteen years ago,[3] constitutes one of the most profound changes which have been

[1] This attitude is strikingly illustrated in Balzac's novel, *Le Contrat de Mariage.*

[2] Save in the exceptional case where the mother had been abducted.

[3] L. Nov. 16, 1912.

effected in the French law of personal status as it was originally regulated by the Code.

Napoleon's commissioners had provided that the illegitimate child should be entitled to a definite share in his parents' estate in the case of intestacy, a share which varied according to the rank of the other heirs with whom he was in competition. If his competitors were his legitimate half-brothers and sisters, his share was one-third of what he would have taken if he, too, had been legitimate. By a law now thirty years old,[1] which amended the three relevant articles of the Code, his proportion is raised to one-half. The same law increases in similar ratios the reserve or legitim of the natural child, the share of the paternal estate of which he cannot be lawfully deprived by will.

Married Women.—The status of the married woman was defined by the Code on lines which, for 1804, were comparatively liberal. Husband and wife were free to define their property-relations by their marriage contract as they chose, provided the husband's legally regulated right of administration was not impaired. In the absence of any contract, the wife retained her separate property, subject always to the husband's administration.[2] On the other hand, no woman, married or single, could witness a notarial deed or a marriage register, no married woman could take any legal proceedings without the consent of her husband on the authority of the Court ; and no married woman could alienate or acquire property without the permission of her husband. Much of all this has now been changed. Since 1897 [3] women have been eligible as witnesses to deeds and public registers—a reform which, it is curious to remark, preceded by only three years the admission of women to the Bar. Thirty years ago married women were authorized to open a savings bank account,[4] and to draw upon it, without their husband's authority, and post-war legislation has given them the independence necessary for drawing pensions [5] and for joining trades unions.[6] When we consider how recent is our own Married Women's Property Act, or the present state of our law in regard to a married woman's torts, we see that the French and English nations furnish each other reciprocally with ample occasion for astonishment.

Before I leave the subject of family law let me mention some interesting changes made in the law of marriage during the war.

A law of April 4, 1915, authorizes marriage by proxy in time of war, if the bridegroom is on active service in the army or navy. By a law

[1] L. of March 25, 1896, the text of which now constitutes Articles 756 to 766 of the C.C.

[2] But where there has been *séparation de biens* by order of the Court the wife recovered, under the Code, the right of independent administration of her estate. C.C. 1449.

[3] L. Dec. 7, 1897. [4] L. July 20, 1895. [5] L. Dec. 28, 1922.

[6] L. March 12, 1920. By a law of July 13, 1907, married women acquired the right to the free disposal of their separate earnings and of any property representing such earnings.

passed a few months later this privilege was extended to prisoners of war ; and three years later, in April 1918, it was provided that if a marriage had been celebrated by proxy after the bridegroom had in fact died, the marriage should nevertheless hold good and produce its full effects as regards the legitimation of children and the rights of the widow.

Registration of Title.—One of the definite errors with which the authors of the Code may fairly be charged is their failure to provide for the registration of title to land. This was the less excusable or explicable for the reason that both Brittany and French Flanders (the *pays de nantissement*) had enjoyed systems of registration, either of deeds or of title, for centuries prior to the Revolution, and that the *Directoire* had established on paper, at any rate, a general system of registration of deeds for the whole of France. The Code abandoned all these conquests of human reason and contented itself with a fundamentally imperfect system of registration of mortgages. When the Code was extended to the Rhine provinces of Germany and to Belgian Flanders it had there also the effect of destroying a far superior traditional system of land registration.

Let me remark, in passing, because it is undoubtedly relevant, that a feudal system of land tenure such as existed in France before the Revolution, unlike a system of universal free tenure such as was set up by the Code, tends to develop its own system of registration, by spontaneous internal secretion. For lack of time to develop this reflection, I must ask you to consider the case of the manorial court-roll.

The inconveniences of the system established by the Code were not long in making themselves felt ; but a generation and a half passed before they were remedied ; and even then it was Belgium which led the way, by a law passed in 1851, which established a general and fairly complete system of registration of deeds. This law was imitated in France four years later, in 1855.

But the system thus established was of course far from perfection ; for it is common knowledge that registration of deeds is a very inferior system to registration of title. Registration of title establishes absolute rights ; registration of deeds only determines priorities in a limited circle.

It has been interesting and instructive to observe the consequences in Egypt of the substitution of the inferior system for the superior. When the French Code was imported into Egypt in 1875 it had already been reformed ; but though it was much better than it had been, it once again illustrated Gresham's law, and ousted something better still, namely, the old law of the country, which, by an effective co-operation between the Cady and the tax-collector, secured a very fair approximation to registration of absolute title. But Gresham did not have it all his own way. Before very long the pressure of tradition and convenience, coupled with the fact that the land-tax registers continued to

function, began to overwhelm Code and Courts alike; and now for many years past the judges in Egypt have so far complied with the demands of public sentiment that they have made no difficulty about addressing mandatory injunctions to the Inland Revenue authorities to compel them to amend the tax-register in suits in which no fiscal question, but only the title to land, is primarily in issue.

Rate of Interest.—Coming back to France, I pass to another question which has given rise to marked fluctuation of opinion, namely, that of the propriety of fixing by law a maximum rate of interest. The Code expressly proclaimed liberty of contract in this respect. Three years later, in 1807, a maximum rate of interest was laid down, of 5 per cent. in civil, and 6 per cent. in commercial contracts. In 1886 opinion veered again, but only half-way round; liberty was restored to commerce, while non-commercial loans remained subject to the maximum. Finally, in April 1918, the restriction on the civil rate of interest was suspended for the duration of the war, and for a period of not less than five years thereafter to be determined by what we should call an Order in Council. No such order has, so far as my information goes, as yet been promulgated. The Belgians, be it noted, restored complete freedom of contract in this respect so long ago as 1865, and are thus found once again to have anticipated their great neighbours.

Bills of Sale.—The rate of interest is a comparatively arid subject; let me endeavour to efface the impression by taking, as my last example of the exclusively legislative modernization of the Code, the more interesting topic of bills of sale. In Roman law, as you will remember, it was possible to hypothecate a moveable—or, in English, to mortgage a chattel. Long before the *Code Napoléon* was drafted this had ceased to be possible in France. Even the owner had no action *in rem* to recover a moveable if he had parted voluntarily with possession; still less was it possible to give a real action to a mortgagee; and without a real action there is no mortgage; so we find the Code lending its authority to the old maxim: *Les meubles n'ont pas de suite par hypothèque.*[1] But this rule has long ago succumbed to economic necessities; and as practical men the French have realized, as we have done, that you can perfectly well permit the hypothecation of moveable property, provided you make proper arrangements for the publication, that is to say, for the registration of the charge. No general law has been made; but by a series of statutes, in the English manner, successive categories of moveable property have been opened up for hypothecation; the way was opened in 1874 by a law providing for the mortgage of ships[2]; and within the last thirty years provision has been made for the mortgage of the goodwill of businesses,[3] of the moveable stock of farmers,[4] and then of hotel-keepers,[5] of rivercraft,[6] a form of property

[1] C.C. 2119. [2] L. Dec. 10, 1879. [3] L. March 17, 1909.
[4] L. April 30, 1906. [5] L. Aug. 8, 1913.
[6] L. July 5, 1917, *sur l'immatriculation des bateaux de rivière et l'hypothèque fluviale.*

to which, as we all know, the admirable French canal system lends considerable importance; and finally, by a law passed in 1925,[1] it has been made possible to mortgage the most moveable of moveables, namely, an airship.

I want now to illustrate the way in which the Code has been adapted to modern needs, not so much by legislation as by what the Germans call the "freie Rechtsfindung," or "free law-finding" of the Courts—a process which is commonly believed to be peculiar to the English-speaking world.

"Stipulation pour autrui."—I take as my first example the way in which the French judges, with very little encouragement from the Code or from tradition, but under the pressure of practical necessities, have built up a modern law of Trust. The essence of a trust is that it confers a right of action upon a person who is a stranger to the creative transaction. No system of law can dispense indefinitely and for ever with some such institution; in other words, no civilization can afford to let itself be tyrannized over by the maxim: *Res inter alios acta aliis neque nocet neque prodest.* In 1804 the draftsmen of the French Code reproduced contemporary doctrines on this subject in two articles. Art. 1165 lays down the classical maxim—that a stranger to a contract can neither invoke it nor be prejudiced by it; Art. 1121 provides an exception, to the effect that I may by contract confer an actionable right upon a stranger, if such is the condition of an advantage stipulated for myself—whatever that means—or if such is the condition of a gift made to the promissor. The ominous breach thus left open in the classical maxim was little noticed or used for the first half-century following the promulgation of the Code. The legal life of France was carried on with all the decorum of a King's Bench Court. It was not till about 1860 that the great utility of Art. 1121 was discovered, and that it began to be applied by the Courts to meet cases where common sense, justice, and practical convenience imperatively demanded the sublimation of the law of contract. In the last seventy years the Courts have made an increasingly vigorous and beneficent use of the somewhat obscure provisions of the article in question.

At the present day the doctrine of *stipulation pour autrui* plays almost as large a part in the legal life of France as does the Trust with us. It is, for example, by the judicial interpretation of Art. 1121, that if a Frenchman insures his life for the benefit of his wife, and dies insolvent, his wife takes the benefit of the policy as her own property, and free from competition with the creditors.[2] In this way also it has been held that where a municipality makes a contract with a public service company with clauses specifically designed in favour of future sub-

[1] L. May 31, 1925.

[2] See, for example, *Laguerre* v. *Lambert*, D.P., 83.2.129. In *Dieudonné* v. *Blaise*, S.P. 85.1.5 the same principle was extended to children of the assured.

scribers, the latter may acquire a direct right of action against the company.[1]

Malicious Exercise of Rights.—Another interesting development of French jurisprudence in recent years has been the progressive recognition of the doctrine that the law will not permit rights to be exercised in a malicious or vexatious manner.

It will be remembered that that doctrine is definitely laid down in the German Code, which provides that "the exercise of a right with the sole purpose of injuring another person is prohibited,"[2] and by the Swiss Code, which lays down that the "manifest abuse of a right is not protected by the law."[3] The same principle is now also, by legislation and judicial decision, firmly established in France.

Take, for example, the provision of Art. 641 of the Code, which formerly ran "the owner of land on which a spring rises is entitled to make such use of it as he pleases." It was decided so long ago as 1856 that it was a tortious act for the owner of a spring of Vichy-water to pump up more than he wanted for his own purposes so as to injure a neighbouring owner of a similar spring.[4] In 1898 the Code was altered, to meet modern views, to read "the owner of a spring is entitled to use it as he pleases within the limits and for the purposes of his property."

The wanton obstruction of light, even where the plaintiff admittedly had no easement, has been held to be tortious.[5] Another example is furnished by a case closely resembling the classical English case of *Keeble* v. *Hickeringill*. In the French case the Prince of Wagram recovered damages from a neighbour for frightening away his birds "by vexatious manœuvres manifestly practised with the intention of causing injury."[6] For a long time, on the other hand, the Courts refused relief to a servant or employee who, being employed for an indeterminate period of service, had been discharged without reasonable cause. Finally, in 1890, Art. 1780 of the Code was amended so as to open the door to actions for unreasonable dismissal, even where, in strict law, such dismissal did not

[1] Here is another interesting illustration of the application of Art. 1121. In the case of *Evêque de Périgueux* v. *Ville de Périgueux* (S.P. 92.2.89) the facts were that a former bishop of Périgueux had given 30,000 frs. to the town to support schools taught by the Frères de la Doctrine Chrétienne; with the proviso that, in the event of the schools ceasing to be so taught, the gift should revert to the bishop's successor in office. The town adopted secular education. The episcopal successor to the donor brought suit to enforce the reversion in his favour. The donor's heir had meanwhile purported to revoke the gift. Held, that the reversion in favour of the bishop was a valid *stipulation pour autrui* under Art. 1121; that revocation by the heir was impossible after acceptance by the beneficiary; and that, unlike the case of a donation, such acceptance could be validly made after the donor's death.

[2] B. G. B. 226.

[3] Swiss C.C. 2.

[4] *Badoit* v. *André*, D.P. 56.2.199.

[5] *Doerr* v. *Keller*, D.P. 56.2.9.

[6] *Prince de Wagram* v. *Marais*. D.P. 73.2.185.

constitute a breach of contract.[1] The principle has also been applied to vexatious litigation, including unreasonable resistance offered to a just claim, and in boycotting cases. Indeed, in a great case decided on appeal in 1892,[2] in which the facts closely resembled those in *Allen* v. *Flood*, the Court of Cassation came to a conclusion diametrically opposite to that reached by the House of Lords, and laid down that it was tortious for a Trades Union to compel an employer to dismiss a workman on the sole ground that the latter had left the Union.

Influence of Code Napoléon on the World.—I pass now to my second head, for the due consideration of which I fear that I have left inadequate time; namely, the influence exercised by the *Code Napoléon* in the world at large. That influence has been and is very great; and it is in no small measure by virtue of the Code that French culture exercises so great an attraction as it does, at the present day, in so many different countries in all parts of the world.

When the Revolution broke out France had for a century and a half held, almost without a rival, the premier place among the nations of the world. Her language was well on the way to succeeding Latin as the common speech of civilized men; her literature, her arts, the fascination of her culture, the splendour of her capital, the heroism of her missionaries, held all mankind spellbound. Yet her law had no admirers or imitators in other countries. Few foreigners thought it worth while to study her meagre legal literature; few students from abroad sought admission to her law-schools. The Revolution and Napoleon, by the alarm, as well as by the nationalism which they provoked, did much to forfeit the pre-eminence which France had won and was winning by peaceful penetration. But the Code saved the situation; and ever since the day of its promulgation France has done an enormous export trade in law; indeed, until the German Code was published, she was without a rival. I am speaking only of the export trade. Our own Common Law, great as is the place which it occupies in the world, has planted itself only under the shadow of the Union Jack and the Stars and Stripes. In the absence of an English Code, the expansion of the Common Law has been perforce confined to countries which, by conquest or by colonization, possess English-speaking rulers.

The nineteenth century was pre-eminently an age of nation-making.

[1] The relevant passages are as follows:

Le louage de service, fait sans détermination de durée, peut toujours cesser par la volonté d'une des parties contractantes. Néanmoins, la résiliation du contrat par la volonté d'un seul des contractants peut donner lieu à des dommages-intérêts. Pour la fixation de l'indemnité à allouer, le cas échéant, il est tenu compte des usages, de la nature des services engagés, du temps écoulé, des retenues opérées et des versements effectués en vue d'une pension de retraite, et, en général, de toutes les circonstances qui peuvent justifier l'existence et déterminer l'étendue du préjudice causé. Les parties ne peuvent renoncer d'avance au droit eventuel de demander des dommages-intérêts en vertu des dispositions ci-dessus.

[2] *Joost* v. *le Syndicat de Jallieu*, S.P. 93.1.41.

In Europe it saw the creation or the unification of Germany, Italy, Belgium, Roumania, Bulgaria and Greece ; on the American continent it saw the birth of fifteen new nations ; while in the East it saw Japan, Siam, Turkey and Egypt stir in their slumber, or rise up fully alert, to grasp the secret of European pre-eminence.

Of these twenty-five nations almost all sought to mark their accession to political maturity, or to proclaim their adhesion to the European circle, by a general revision and codification of their laws ; and in the vast majority of cases the model followed was the *Code Napoléon*. This was not, it is true, the only Code on the market—there were, for example, Prussian and Austrian codes in existence ; but France held the field. The *Code Napoléon* was attractive in form ; it was written in French ; it was, or seemed to be, easy to understand ; it bore the name of the greatest publicity-agent the world has ever seen ; it claimed to be catholic, imperial and universal ; it was secular without being irreligious, and democratic without being revolutionary ; in short, according to the ideas of nineteenth-century liberalism, it set forth in chapter and verse the fundamental articles of the social contract. Nor did Napoleon's Code have to rely upon its intrinsic merits alone.

The reorganization of the French educational system, and particularly of the Universities, which constituted one of Napoleon's principal achievements, created law schools, which in their turn produced a noble literature of exposition and commentary on the Code. French professors of law, whether in their lecture rooms at home, or on their missionary journeys to Japan, Persia, and Egypt, expounding the treatises of Aubry et Rau, Demolombe, or Planiol, have proved incomparable coadjutors in the task of enabling the world to assimilate and to digest the Code.

Just as the scholars and the missionary priests of the Roman Church recovered on a higher plane the Empire which the Cæsars had lost, so the law professors and the textbook writers of France went far to restore the national prestige which had been lost on the fields of Leipzig and Waterloo.

In 1820, only five years after the fall of Napoleon, the Tsar appointed a commission to prepare a code for the kingdom of Poland, on the model of the French Civil Code, several parts of which were promulgated as law.

It is not surprising that the *Code Napoléon* should have taken a deep root in countries such as Italy, which had not only adopted it of their own free will, but whose traditions resembled those of France. More remarkable is the hold it obtained in Germany, where it was implanted by force of arms in a morally alien soil. Nevertheless, the French Code remained the law of the land in Baden and the Prussian Rhine provinces for nearly a hundred years, until the German Civil Code came into force in the year 1900. Not only was it in force, but it was actively cultivated.

The first commentary in any language which attained celebrity was a German treatise written by the Heidelberg Professor Zachariæ,

while a review devoted to French Civil law—Puchelt's *Zeitschrift für französisches Civilrecht*, founded in 1870 and published at Mannheim, continued to appear until twenty years ago.

Egypt offers an example of the reception of French law by a people totally alien to Europe in language, religion, and social and political traditions. When, fifty years ago, Nubar Pasha secured the consent of the Powers to the institution of the International Courts, it was agreed without debate that the only possible law with which to equip them was that of the French Codes. Eight years later, the year after the British Occupation, the French Codes were extended to the newly reorganized native jurisdictions, and this became the law governing all civil causes in Egypt excepting those relating to the family and personal status.

The inevitable consequences followed; and after forty years of the British Occupation, British officials were administering French law in Arabic, teaching French law in English, and arguing French law in French; and to-day a young Egyptian who has learned English at school, finds that he has to learn French when he grows up, in order to engage in business and to mix in society. And the English administrator has often had occasion to observe that proposals for innovation were at least as likely to be criticized on the ground that they offended against the gospel according to Napoleon as for any reason based on the traditions of Islam.

The course of events in Japan has been different, and even more instructive.[1] One of the first acts of the Restoration Government, so early as 1870, was to cause the *Code Napoléon* to be translated, and to send for French lawyers to supervise the administration of justice and to organize legal education. Though not promulgated as law, the French Code in this way, and in the absence of any serious rival system, either indigenous or foreign, acquired great authority from the beginning of the new regime. In 1880 there was published a draft Civil Code, prepared by M. Boissonade, a member of the French legal mission. This code, though it too was not promulgated as law, exercised for sixteen years as great an influence as if it had been in force, and was treated by the judges as a statement of the principles of natural equity. Meanwhile, concurrently with the colleges teaching French law, the Japanese Government had made provision for instruction in Anglo-American law at the University of Tokio.

In 1892 M. Boissonade's Code was on the eve of being put into force, when the Diet voted that it should be submitted to a further revision. This decision appears to have been due to the dissensions between the partisans of the French and the English schools of legal thought; and the result was that when the revised Code was promulgated in 1896 it was found to be neither French nor English, but German in inspiration.

[1] *Influence du Code Civil français au Japon*—Goraï (*Livre du Centenaire du Code Civil*, II, p. 781).

The publication of the German Civil Code in its final form in 1895 had brought into existence the first serious rival which Napoleon's Code had had to encounter. The German Code had the advantage by the whole range of the nineteenth century; it was a more studied piece of work, more deeply thought out; it distinguished more emphatically between substance and accident, between principle and application; in short, it was more scientific.

In the present century the Swiss have adopted a national Code which, in a much simplified and popularized form, shows evident marks of German inspiration; and the Swiss Code, which was considered some years ago as the most suitable model for an abortive revision of the Egyptian Code, has recently been adopted, as it appears, almost without change, as the Civil Code of Turkey. But Germany came too late into the field; the planet had been almost exhaustively apportioned into spheres of influence, and there were no worlds left to conquer.[1] And the *Code Napoléon* had not yet lost its former magnetic power.

One of the first acts of the remarkable man who recently founded a new dynasty in Persia was to do what so many Cromwells have done before him, and to telegraph to Paris for the *Code Napoléon*, a boxful of commentaries and a commission of French jurists. We may hazard the conjecture that before the month was out a French cruiser had set sail from Marseilles with the mission and the Code on board.

[1] But there remain the not unimportant exceptions of China and Russia as possible fields for the expansion of either the French or the German law.

THE BRITISH CONCEPTION OF NEGOTIABLE INSTRUMENTS *v.* THE FRENCH.

[*Contributed by* MADEMOISELLE LÉONIE M. MITCHELL, *Docteur en Droit, Paris.*]

WHY reopen a long debated case? Has not the parallel been sufficiently drawn in the various international conferences which have been called with the object of unifying the law of Bills, Notes and Cheques? Is the subject of special importance now? And is it of any importance at all? Since nations vary in so many respects why should their different conceptions of negotiable instruments give rise to concern?

That the controversy is not a novelty, I am well aware. But that its solution is important and will become increasingly so, not only to jurists but to the world, is certainly felt by all who come in direct contact with business.

Gold Supply.—The annual mass of commercial transactions has increased stupendously since the war. New industrial methods of utilizing raw material, new markets for the new products, new and greater needs of old markets, new countries entering the field of competition both as producers and customers, are rushing the world along on a rising tide of business activity, of which the spreading influence of standardization, which from America has reached Europe and is even now gaining on Asia and Africa, is constantly increasing the strength. One feels that an outlet must be found or general congestion will surely result. It may come even sooner than is expected, through gold shortage. Some of the existing gold fields are already giving signs of impoverishment, few new ones have been discovered and counting on future discoveries of gold deposits is too precarious a hope to be considered a solution! The annual increase of gold reserves necessary to cover increasing bank deposits and currency alone has been estimated at £78,400,000 approximately. Mr. Joseph Kitchin, Manager of the Union Corporation of Transvaal, estimates the average yearly output of the world since 1918 at £73,200,000 only. The new discoveries in South Africa are counterbalanced by the weakening output of American mines. Furthermore, a certain proportion of the gold production is absorbed every year by industry and hoarding. The resulting deficit, unless unlooked-for mines are discovered shortly, has been estimated at £400,000,000 in ten years.

The situation therefore is this: the gold supply of the world is decreasing—or at least not increasing—when the growth of its business

causes an increasing demand. How is the ensuing deficit to be met if the activity of the world is not to be handicapped? The Comptroller of the Royal Mint of Great Britain summarized the situation in one sentence: "Unless we are prepared to face a prolonged fall in commodity prices it is imperative to economize on gold, both as regards its use as a commodity and as money."

Use of Credit.—One of the most effective ways of economizing currency in business transactions is the use of credit. Instead of having to transfer a certain amount of currency for the settlement of each contract, credit allows the same amount of money to cover a virtually unlimited number of payments. When gold becomes scarce, or at least when there are risks of its being insufficient to meet the needs of commerce, judicious methods of credit should be applied and every possible way of developing it encouraged. Of all the known means through which credit can materialize and be used for practical purposes, the best because the simplest are certainly the various negotiable instruments, the most important and well known of which are the Bill of Exchange and the Cheque. The former is exactly adapted for the requirements of time payments, of credit; the latter, which is really a bill of exchange on demand, is more especially fitted for the actual settlement of transactions, for payment.

Bills of Exchange and Cheques.—These two instruments, invented, or at least systematized, by Italian merchants in the Middle Ages, have become known in every part of the world where there is commercial activity and the laws or customs of all countries with any civilization have sanctioned and regulated their use. Pertaining to commerce, they are by nature among the few human inventions of international importance. Being constantly used in transactions by men of different nationalities, differing laws constantly come into contact on their account. Everywhere the bill and the cheque have arisen out of similar needs, therefore fairly similar rules have been enacted about them even in legislations otherwise absolutely different if not antagonistic. The "Negotiable Instruments question" is perhaps the only one which has been answered by humanity in any way suggesting unanimity. Even though commerce is cosmopolitan, other commercial institutions have failed to near uniformity, probably because although their effects might be widely distributed, they could more or less be domiciled geographically. The negotiable instruments, on the contrary, have no definite "home." They are made to travel abroad; and as travellers equip themselves with a few notions of the language and the customs of the countries they will visit, negotiable instruments have been so regulated that they can be understood and conveniently used wherever they may circulate.

Requirements of Form.—Nevertheless, in this most favourable field, uniformity is far from being reached, witness the conferences repeatedly called with the object of drafting a unique world-wide law of Bills, Notes

and Cheques. The legal conditions of and the consequences attached to the issue of a bill or cheque, but principally their wording, vary from one country to another. However insignificant a formalistic difference may seem in itself, in the matter of negotiable instruments it should not be treated lightly and attributed merely to the literary taste of legislators. In this matter more than in any other a difference in form is apt to reveal an important difference in the very conception of the instrument and its use. Indeed, it is rather remarkable that in comparing the legal requirements for the issue of a bill or cheque and the ensuing legal consequences one finds comparatively few differences between the several legislations on the matter ; most of the variances concern requirements of form and their sanctions. Owing to the rule of abstraction the legal rights involved in the issue of a bill or cheque materialize in the instrument which actually replaces them. For this reason the wording becomes of essential importance and gives a clearer notion of each country's conception of negotiable instruments than might be construed from other legal conditions. These result more or less from the general legal system of each nation. When a bill or a cheque is drawn in a certain country the conditions which determine who can be drawer, drawee or beneficiary, what debts can be paid in that way, the result of such payment, recourse in case of default, will be governed by the general legal system of that country with regard to legal capacity, contracts and liabilities ; but they will throw little light on the nation's views about the *nature* of negotiable instruments and their rôle. This, on the contrary, will be vividly revealed in the requirements of form, by which the negotiable instruments are specifically distinguished from all other instruments, having this particular quality, that, when issued, they replace all other legal obligations which brought about their issue and have a legal existence of their own *in abstracto.*

Uniformity of Legislation.—Since the development of credit is of such importance to the general economy of the world that it can aid gold to meet the increasing demands of trade, the law of Bills, Notes and Cheques should be drafted with the utmost care to ensure their efficiency and further their generalization. This would be made considerably easier if nations adopted a uniform legislation ; but of course it is essential that this legislation be the best possible. Therefore a comparative study of the different existing legislations is of capital interest. The essential point is to discover the several conceptions that have guided legislators. That known, it will be possible to make a judicious choice of the conception best adapted to the services required of negotiable instruments. Only then can a satisfactory uniform law be drafted and every effort made towards its general enforcement. It is perhaps because this preliminary clearing work has not been sufficiently performed, because the several theories about negotiable instruments and their reaction on the whole credit system of the world have not been sufficiently emphasized, that so little has been achieved towards the adoption of a uniform law

and the reform of faulty legislations. Thus in some countries the development of this most useful instrument of credit has been hampered. Many countries are still struggling against a wrong notion of bills and cheques and their legislative efforts towards their generalization come to naught simply because they have failed to define clearly the question under debate.

German Theory.—The best opportunity possible for a comparative examination of the several conceptions of bills and cheques is given by the international conferences called to draft a universal law on the question. Whenever they have taken place three main systems have come in conflict: the German, the English and the French. The characteristic of the German theory on notes and cheques is formalism. This comes from a misunderstanding and exaggerated application of abstraction. Instead of regarding this rule as a characteristic effect attached to negotiable instruments for the convenience of transactions and limited to such purpose, Germans maintain that a bill or cheque actually replaces the legal rights in execution of which it was issued and that once drawn the instrument itself has a legal existence independent of them. The logical result is that in German law the requirements of form have been minutely described and the execution of the instrument is strictly governed by them. No margin has been left for interpretation which would allow German courts to deal with situations unforeseen by their legislators. After the war, this system enjoyed a period of success owing to the fact that most of the new European countries having to construct their legislative systems were parts of the former Austrian and German Empires and were naturally inclined to walk in their steps. But it is doubtful whether this will continue, and still more doubtful whether the German conception be desirable. Formalism has a paralysing effect which deprives legal systems of progressive spirit. Therefore a formalistic notion of negotiable instruments should not be adopted without great circumspection, particularly if they are to help the development of credit of which, to be of any use, the essential quality is extreme adaptability to commercial emergencies.

Choice between Anglo-Saxon and French Theories.—We are thus led to choose between the British—or rather, for the Bill of 1882 has been adopted by the entire English-speaking world—the Anglo-Saxon and the French theories. These two conceptions were very happily defined by Sir Mackenzie Dalzell Chalmers, "the banking theory and the mercantile theory." If one were to put to a Franco-English public the simple question, "What is a negotiable instrument?" the French section would answer, "It is the particular form of instrument used to create a certain kind of contract: the contract of exchange."[1] To the same question it is quite probable that the English section would answer: "A negotiable instrument is a device used by business people and bankers to effect payments in a convenient and easy way."

[1] *Contrat de change.*

French System.—The French have remained strictly faithful to the original purpose of bills. In olden times it was impossible to assign a debt by ordinary legal process. When creditor and debtor lived in different towns the only way for the creditor to collect his due was either to fetch the sum or to have it sent to him, a very risky operation in those times and a hindrance to all except local trade. To obviate the danger and overcome the hindrance, merchants invented the bill of exchange system. It was at first limited to their own guild and trade purposes and sanctioned only by the mercantile courts. The bill of exchange was used solely to transfer a trade debt from one place to another. This object is to this very day the basis of the French law of bills, notes and cheques. In both England and France the origin was the same ; but whereas in England the " transfer " element has become predominant and been used to allow a given sum of money to cover a theoretically unlimited number of payments, transforming negotiable instruments into a form of paper currency, in France the " trade debt " which originated the issue has remained essential, keeping the bills in the rigid juridical category of contracts instead of the supple practical one of means of payments. This survival results from the early codification and the distinction between civil and mercantile law which in France still forms an independent legal system parallel to the common law applied in the civil courts. To this very day French merchants have their own courts, elected by them from people of their own calling. The first law on bills of exchange was the Order of 1673 which codified the usage of merchants. In accordance with the spirit of the time, minute formalistic requirements were enacted so that one could at first sight distinguish a bill of exchange from all other instruments and obviate any doubt as to the competent courts and the legal system applicable. Moreover, bills were drawn in execution only of the contract of exchange. The debtor pledged himself to assure the payment of a certain sum to his creditor in another town. Two conditions were therefore essential to the validity of a bill of exchange : first the existence of a trade debt which the debtor could transfer to his creditor, and second, this debt was to exist in another town or country. The early codification of 1673 crystallized French Commercial Law, stopped its development and meanwhile prevented its absorption into the common legal system of the country. When, in 1804, Napoleon carried out his plan for general codification, the Order of 1673 was used as a draft for the Code de Commerce, thereby preserving the artificial distinction between the common and mercantile law. The conception of the Order of 1673 suffered just a few changes made absolutely necessary by time. It was to this contract idea that Sir Mackenzie Dalzell Chalmers referred when he called the French theory of bills, notes and cheques, " the mercantile theory." French bills have remained in the domain of commerce instead of passing into the practice of banking where they could render much more numerous and essential services.

Drawback of General Codification.—This is an example of the drawback of general systematic codification to effect which general principles must be minutely and definitively laid down. To make them general enough to meet any emergency they must soar above practical contingencies with the twofold result that the law becomes too theoretical and that the possibilities of interpretation which would correct its rigidity are immediately limited by formal rules and definitions. Common law, the practice of law courts coupled with fragmentary codification of the more general institutions, may be a less elegant procedure but it is often more consonant with human nature.

Capacity of Drawer.—Owing to the French distinction between civil and commercial law, the necessary capacity for drawing or endorsing a bill is not merely the general capacity to contract, but also to assume commercial liability. Consequently, an infant who, by "emancipation," has been authorized to carry on business has authority to draw bills but only for the purpose of such business. For women, the system is more complicated. S. 113 of the Code of Commerce states that all women, married or single, carrying on business may draw bills for the purposes of such trade. But they cannot issue bills if not in business unless they be married and specially authorized by their husbands.

"Cause."—Moreover, as bills are drawn to transfer trade debts there must be a pre-existing liability or legal tie binding the drawee to the drawer. This is called the "*cause*" and plays a similar rôle to the "consideration" in English law. Like the latter, the *cause* must be good and valuable. But though the principles are the same the consequences drawn differ widely. In France, accommodation paper is deemed void. The two principal reasons are that there is no *cause* (which may not be considered very sound reasoning: what is the engagement to pay taken by the drawer if not a *cause*?) and that in issuing the bill the drawer pretends that there is a debt due to him which does not exist. The real reason for this attitude of the French courts is that accommodation paper is very often used for dishonest purposes and therefore must not be encouraged.

Instrument of Debt Assignment.—To cover a bill of exchange a debt must be owing to the drawer. But it is not necessary that it be due on the date of issue. It is sufficient that it become due on the same date as the bill. At the time of payment, the debt owing to the drawer, which till then was only a legal entity and the "*cause*" of the bill, materializes in funds, the "*provision*" as it is called in French law. The French and English ideas on bills of exchange have resulted in wide difference of opinion on this point. In England, where the bill of exchange is simply a banking instrument of transfer, there is practically no theory on the question. The instrument exists by itself *in abstracto*, from the previous relations between drawer and drawee, drawer and beneficiary. Therefore the issue of the bill, unless specially notified on the instrument, does not effect assignment to the holder of the funds held by the drawee.

In France, where the bill of exchange is essentially an instrument of debt assignment, the drawing of the bill gives the beneficiary an exclusive lien on the funds. This theory has been largely evolved by the courts to secure for the holder an exclusive right to the funds in case the drawer should become bankrupt and to oblige the drawee to pay when he has received the necessary funds, even if he has not accepted the bill. The holder's right on such funds is rather a prior lien than a right of property as would be expected for an assignee since, in case the funds should be insufficient to cover all the bills issued, these will have a right to be paid in order of maturity.

Statement of Consideration.—The conception of a debt assignment is even more vividly marked in the requirements of form. In this respect the characteristic difference between French and English legislations was until 1922 that French bills must bear statement of the consideration. Its existence was not presumed and if the parties should have omitted to mention the value received, or have given a false statement of it, the bill became void. This requirement, though no longer legally essential, is still observed in practice as a matter of tradition.

Accurate Dating.—Furthermore, the bill should be accurately dated. The law is particularly severe in this respect with regard to endorsements. An antedated endorsement may involve the penalties of forgery. This is a consequence of the bankruptcy laws. Bankruptcy carries with it the incapacity of the bankrupt, at least for business purposes, and all the creditors are entitled to equal treatment in the winding up of an estate in bankruptcy. An antedated endorsement would be a fraud of the bankrupt in favour of a creditor. It is to repress this abuse that such severe penalties have been enacted.

Bearer Bills.—French bills of exchange cannot be drawn to bearer nor endorsed in blank. If this should happen, the endorsee becomes merely the agent of the endorser. There is no actual reason for the rejection of bearer bills except that the French conception of credit is based not on confidence in the debtor but on the multiplicity of guarantees for the creditor. The more signatures there are to a bill the greater the chances of finding one solvent. These are the principal formalistic differences between a French and an English bill of exchange.

Places of Issue and Payment.—It is commonly believed that in France the places of issue and payment should differ. This is an error. Though the notion of the exchange contract is persistent in the minds of French legislators, this particular requirement was abolished in 1894. The contractual origin of the instrument reappears in the sanctions of the requirements of form. In case of omission the bill, as such, is void ; but the legal liabilities resulting from the circumstances which lead to its issue survive and the instrument may be enforced as a promise to pay, an assignment of a debt, if the conditions necessary to the validity of such transactions should be fulfilled. Nevertheless the instrument has no longer a commercial character. It

has already been said that requirements of form were enacted to differentiate clearly a commercial from other agreements. It they fail, the common law is again applicable : the instrument is no longer a commercial instrument, unless it has been drawn on account of a commercial transaction ; it does not effect assignment of the funds ; the civil courts and procedure are competent to settle all dispute between the parties and the statute of limitation is thirty years instead of five as in commercial matters.

Refusal of Acceptance.—If acceptance should be refused, the holder has recourse against all previous endorsers and against the drawer to ask either surety or payment. This right accrues only if he has protested the bill. Protest is a general measure in France. It is required both for non-acceptance and non-payment, for inland and foreign bills.

Overdue Bills.—In France, as in England, a bill must be presented for payment when it is due. If the bill should be overdue the holder becomes liable to damages to all who may have suffered from the delay. Moreover his recourse against previous holders is foreclosed. In case the funds should be insufficient to cover the bill the holder is at liberty to accept partial payment and draw protest for the surplus. This rule was extended to the cheque in 1917.

Cheques.—For this latter instrument, the French and English laws differ considerably but the differences in this case do not result from a premature codification and an arbitrary distinction between common law and commercial law. They arise from an arbitrary distinction between a cheque and a bill of exchange payable on demand. The French consider the cheque merely as a means of drawing on one's bank account. Therefore people who own a bank account seldom use a cheque to pay their creditors. When they do so, they are looked upon with suspicion. The regular process in the public's estimation should be for the debtor to draw on his account and then pay his creditors in cash. The general conception is opposed to the use of the cheque for payments on demand as complement of the bill of exchange for time payments.

Capacity to Draw.—Capacity to draw a cheque is the common law capacity. The instrument not being considered as a commercial institution there was no necessity to establish a distinction similar to that of bills of exchange. As it is payable on demand the "*provision*" *must* exist at the time of the drawing : the drawee's debt to the drawer *must* be due from that date and not merely as for bills of exchange at the time of collection. As in England, indication of the value received is not necessary and the instrument may be drawn to bearer : the cheque being used for payments rather than for credit purposes the multiplicity of sureties is not so essential.

Date and Place of Issue.—Both the absence of date and post-dating are fined 6 per cent. of the amount of the cheque. The reason is that by post-dating a cheque one would get the advantages of a bill of exchange on demand which is subjected to heavier tax. The funds for a cheque

must be available at the time of issue. By post-dating, the drawer may put off the time when he must make provision and yet pay a lower stamp duty. The place of issue must be expressed, under the same penalty as the date, because the time for presentation varies for cheques in town or out of town: five days from the issue in town and eight days out of town.

Presentation for Payment.—Once issued the cheque gives the owner an irrevocable lien on the funds. Nevertheless, if the cheque is not presented for payment within five days if in town or within eight days if in another the drawer is not compelled to keep the funds at the holder's disposal. The only recourse is that accruing from the previous relations between drawer or endorser and beneficiary. The instrument itself is discharged and the drawer is not responsible if the drawee should stop payments. To testify that presentation was made within the legal delay the date of payment must be marked on the cheque when cashed, under a fine of fifty francs.

Penalties under French System.—In France, since 1926, the banker who holds insufficient funds to meet the cheque must tell the holder to what amount the instrument is covered and the latter has an option between accepting partial payment with recourse for the surplus or no payment and recourse for the total. The same law enacts that all cheque forms delivered in blank must, under penalty of a fine of thirty-six francs, bear the printed name of the person to whom the cheque book was delivered.

In order to increase the guarantees of payment the French legislators have devised this complicated and rather useless penal system. The recourse for payment should suffice if the drawer is in good faith. If not, the ordinary sanction of false pretences would be adequate redress. Why add another penalty specially planned for cheques, the result of which is to hamper their diffusion by the risk of penal prosecution if one has been careless or the banker slow in establishing the drawer's account?

Since 1917 the drawing of a cheque "*sans provision*" even by error, is fined 6 per cent. of its value with a minimum of one hundred francs. In case of bad faith the penalty for "*escroquerie*" (swindle) is applied. New dispositions were enacted in 1926 to punish the drawer who withdraws the funds even in good faith or stops the cheque in bad faith. Payment can be stopped only in case of loss of the instrument or bankruptcy of the holder.

Unfamiliarity with Technique of Banking.—It is clear that what most hinders the development of negotiable instruments in France is a lack of familiarity with the technique of banking. It is remarkable how few people in France have a bank account. Even when they have one it seldom occurs to them to refer to their banker as financial agent or executive. If they want to invest, they apply to the State or to a notary, who generally suggests a loan guaranteed by mortgage. If they

want money, again they go to the notary to effect a mortgage or raise a loan on securities. For speculative purposes most of them apply to a stockbroker. It is only the few people forming the business world who centralize their financial operations in the hands of their banker. For the mass, the bank is only a safekeeping place for valuables and surplus liquid cash that one does not want in one's drawer yet which may be needed at any moment. They prefer the trouble of keeping their own accounts to entrusting the work to the banker by means of cheques paid to or on their account. They prefer to go through complex and extensive loan negotiations with private individuals to asking the bank where they have an account to open them a credit.

French Economics.—The cause of this attitude is probably a result of the former financial power of France and her methods of capitalism. Before the war, French economics were based on saving.

"*L'épargne*" was the great source of capital for her commerce and industry. France's accumulated wealth could even meet foreign needs. She was the world's banker. She it was who lent money, having more than the home market required. She had no necessity to ask for credit, still less to organize it. But the war absorbed all her hoarded capital. The reconstruction work had to be done without any capital reserve of funds and without payments from Germany to repair the war damage. The result was a shortage of capital for business transactions. What took place in France is what will take place in the world unless the gold reserve is economized. Since the war the rôles are changed. The French must now resort to credit, but they adhere to habits and methods of the time when capital was plentiful. Of course, like saving, credit may be abused. Its development may be carried too far, as in the United States where the instalment system has generalized credit engagements even in the most modest classes. Credit means confidence and there are limits to human confidence. In French economics no new enterprise is started unless covered by surplus capital. But in America, the profits of a new enterprise help to amortize the credit opened for its creation. To such an extent is this the case that it is estimated that for each gold dollar there are fourteen dollars of credit opened. But the fact that credit should be used, not abused, is not a reason to dispense with credit, particularly when capital is scarce and the world's gold reserve dwindling. The great advantage of the English idea of negotiable instruments, whether for term payments like bills or on demand like cheques is that they are based on the development of bank deposits. The fortune of the whole country is centralized in the hands of a few specialized experts who know how to dispose of it to the best advantage and can mobilize it rapidly. A striking example of the results of the two systems was given in 1914. While in England a moratorium of five weeks sufficed to give bankers time to meet the shock of war, in France, where the public fortune was not centralized in skilled hands and was often invested in land, a form of investment difficult to

mobilize for credit purposes, the moratorium was kept in force till 1920, causing severe injustice and greatly affecting the possibilities of commerce.

Bills of Exchange Act.—The Bills of Exchange Act has been in force throughout the entire Anglo-Saxon world since 1882 and has given satisfaction. Therefore the conclusions of Sir M. D. Chalmers before the League of Nations in 1923 are judicious and as valid as ever : " On the whole, our law has been working satisfactorily. We must therefore show great prudence before adopting any change that might put its mechanism out of gear." The same cannot be said of the French conception, else why the constant demand for reform, particularly as regards cheques ?

THE ROOT CAUSES OF BOLSHEVISM.

[*Contributed by* Baron Heyking, Ph.D., D.C.L.]

Two postulates may serve as a criterion for testing the condition of Russia: viz. (1) a government by the people for the people; (2) the education of the masses as a necessary requisite of any civilized State.

The question to be answered is this: How can it be explained that Russia, covering one-sixth of the dry surface of the globe, stretching from the Arctic north to the tropics, bearing every imaginable kind of crops and fruit on its fertile soil, provided with wonderful waterways allowing of easy communication, endowed with untold mineral riches—should be poor, miserable, desolate? and how has it come about that a set of, say, 800,000 self-appointed tyrants have been able to subdue a population of some 145 millions and keep them in submission for more than ten years?

At the very outset, it is necessary to remember the fact that Soviet Russia has spent enormous sums of money and strained every nerve to propagate Bolshevism all over the world and that this tremendous effort has not yielded any appreciable result—even the Chinese revolutionaries, labour parties and advanced socialists having taken a firm stand against it[1]; we may therefore surmise that this régime, or shall we say this sort of conspiracy, must be peculiar to Russian ethnic and political conditions, having a strong organic connexion with Russia's historic past.

Outcome of the Great War.—But if we turn more particularly to the reasons which have brought about the present situation in Russia, we must realize that Bolshevism is first of all an outcome of the Great War. The War was a fatal mistake, a mistake because the Russian Government should have realized that since the discomfiture of the Japanese war, the army had not been properly reorganized—a fatal mistake because it was the last link in a chain of events in the past for which Russia was not to blame. When the Russian army, after the victorious war against Turkey in 1877–78, stood at the gates of Constantinople with full right to occupy the Turkish capital, Beaconsfield, who was then head of the British Cabinet, put a veto on Russia's move and the iniquitous peace

[1] The attempts of the Bolshevists to dominate international labour have been indeed a failure. Ramsay MacDonald, in a lucid article published by the *New York Times* of May 13, 1928, draws a line between the Russian communists being an "autocratic, reactionary and conspirative" venture and the labour party standing by democratic principles.

of St. Stephens and the Congress of Berlin ensued. If Russia had then been allowed to settle the Balkan question, the world war might have been avoided. Austria's interference in the fate of the Balkan Slavs and her subsequent occupation and annexation of Bosnia and Herzegovina, made the War a matter of course for Russia, and finally, the political conjuncture of Europe, divided as she was into two groups of States opposing each other and the idea of the balance of power—a real death-trap for peace—did the rest in bringing matters to a head.

When Russia had lost the War, the country found itself in a terrible state of disorganization ; famine had broken out and discontent had reached its height. Revolution was ripe and took first the moderate postulate of the so-called " Cadet party," demanding a Cabinet responsible to Parliament. This course, however, did not satisfy the more radical elements which demanded an entire reorganization of the country on extreme socialistic lines. Finally, the revolution, shifting even more to the left, found expression in Bolshevik communism. The attempts of Koltchak, Denikin and Wrangell to reconquer Russia were failures because it was easy for the Bolsheviks to persuade the peasants that these generals wanted to reclaim the land which the peasants had taken with the connivance of the Bolshevik Government, and even up to the present the Bolsheviks have kept the peasants passive by means of this same imaginary threat.

In his diary of the War, the French ambassador at the Court of Nicolas II, Paleologue, cites the words of the Russian industrialist, Putiloff, who said : " In Russia a revolution can only be destructive because the educated classes are an infinitesimal minority without organization or political experience, without contact with the masses. The greatest crime of Tzarism is that it did not admit political thought outside the bureaucracy and in this respect it has succeeded so well that the day when the Tchinovniks—State officials—disappear, the entire Russian State will crumble away." These prophetic words of an independent and competent Russian are corroborated by the opinion of Mr. Hoover, noted in the record of Operations of the American Relief Administration, during famine in Soviet Russia, in 1919–1923.[1] He states : " Where the lower classes have been kept in ignorance and distress the Bolsheviks' propaganda is fatal and does violence to democratic development." As a matter of fact, the Russian people have not yet had a fair chance of proving their worth ; the bulk of the population have not been touched by the feeble attempts of their rulers to raise them from their primeval backwardness.

Varangian Rule.—Russian history begins at the ninth century, when Slavonic and Finnish tribes living at Novgorod and in the vicinity of the Great Lakes requested Scandinavian princes with their followers to come and rule over them. These princes, Rurik or Hrorek, Oleg or Helge,

[1] *The Famine in Soviet Russia*, 1919–23 (" Operations of the American Relief Administration "), by H. H. Fisher. New York, 1927.

Askold or Hoskulde, called Varangians and Russ, were probably akin to the Vikings who founded new realms in Iceland, Normandy and Sicily. They used to make semi-warlike and semi-commercial expeditions to the Black Sea and Constantinople, down the Dwina and the Dnieper and also down the Volga into the State of the Hazars ; they settled finally at Novgorod and Kieff at the request of the " Folkmote," called the " Veche." The Veche, composed entirely of free men, impersonated the sovereignty of the people ; its competence was unlimited, it chose the ruler and could also expel him : it was thus a super-parliamentary form of government ; it concluded with the chosen ruler a covenant, constitutional charter or contract called a " riad," which was binding on both sides. It was altogether a thoroughly democratic form of government. But soon the Varangians began to encroach upon the liberties of the people. They made a law that only Varangians should be chosen to be rulers, and, furthermore, the dawning era of feudalism obscured the rights of the people.

13th Century Despotism.—Then, in the thirteenth century, southern and central Russia were over-run by the Tartars, whilst the North, with the great republics of Pskov and Novgorod, remained free and true to their historic democratic traditions. The Tartar yoke lasted some 250 years and destroyed every vestige of freedom and liberty, and when out of this tyranny a new principality managed to arise—that of Moscow, its clever prince, Ivan Kalita, still a Varangian and a descendant of Rurik, took advantage of the despotic rule of the Tartar Khan to imitate it. Thus, when the Tartars had been finally expelled, the rights of the people were not restored and the despotic form of government remained.

Autocracy was further strengthened by the marriage of the Tzar Ivan III " The Great " of Moscow, with Sophie the niece of the last Byzantine Emperor Paleologue, and the pretension derived from that union that the Tzar of Moscow was to be considered as the successor to the Byzantine Emperor, as Leader of the Greek Orthodox world. Hence the fatal identification of State and religion in Russia. To make this strange evolution from democracy to autocracy complete, Ivan the Terrible conquered the republics of Novgorod and Pskov and destroyed these once flourishing democratic communities.

House of Romanoff.—In 1598 the House of Rurik died out and after fifteen years of utter anarchy the son of the Metropolitan of Moscow, Michael Romanoff, was elected by the " Sobor," an assembly of notables, to be Tzar of Moscow. Under the Romanoffs, autocratic rule was still more developed. The great mass of the population was purposely kept in ignorance and bondage with a view to maintaining the autocratic power of the Tzar. The ancient Veche, the covenant which the people used to draw up with their ruler, the Councils of the Ruler, the Duma, and the Sobor, were all abolished or became inoperative. The Bojars, the nobles, whose advice was sought in earlier days, were dispersed.

The reforms of Peter the Great (1689–1725) and his followers, did not concern themselves with the political collaboration of the people in the governance of the State ; they did not introduce private landed property of the peasants, but were designed with a view to strengthening the autocratic power of the Tzars. Catherine the Great, the friend of Voltaire and Diderot, founded some hundreds of primary and secondary schools. But when the governor of Moscow complained to her of the lack of interest of the people in these schools, the Empress replied, " You complain that the Russians do not want to learn. It is not for them that I have founded these schools, it is for maintaining our prestige in the eyes of Europe. On the day that our peasants desire to learn, neither you nor I will be left in our posts." Apologists of autocracy like Katkow and the older school of Slavophiles with their political platform—" Autocracy, Orthodoxy and Nationalism," pretended that the Russian people were only capable of existing under that rule, whilst it is a well-known historic fact—already alluded to—that the Slavs lived in democratic communities and that one of their outstanding characteristic features was the love of personal freedom to the extent of sometimes degenerating into anarchy.

Serfdom of the Peasants.—Many reforms of the Tzars were imbued with a liberal spirit. Peter changed his feudal army of landowners and their serfs into a standing army which allowed him to defeat Charles XII of Sweden at Pultava. He supplanted the privileges exercised by the hereditary nobility by State service open to all, but far too little, if anything, was done for the education of the peasants. Catherine the Great even extended the system of bondage and serfdom of the peasants in order to strengthen the local self-government of the nobility. The peasants were bound to the land in order to become the property of the landowner. To simplify taxation, the Government introduced the principle of mutual responsibility in each village community (*krugovaia poruka*) and thus deprived the peasant of his personal responsibility. When serfdom was finally abolished in 1861, the landed property of the village community remained undisturbed, thus depriving the peasant of the civilizing influence of private property. As a matter of fact, the village agrarian communism, the " Mir," has been the root cause of the poverty, ignorance and moral inertness of the Russian " mujik." When on November 22, 1906, on the initiative of the minister Stolypin, the agrarian régime was declared to be obsolete, allowing the peasants thereby to suppress their village communism, if they should choose to do so, in favour of individual ownership of the land, the reform came too late to change the mentality of the peasant. When Bolshevism broke out it found the mentality of the peasant predisposed to ignore the right to private property of the landowners and in favour of appropriating their estates. Even local self-government as introduced by Alexander II and the State Duma created by Nicolas II were of small benefit to the peasant, because he was not ready for it ; he lacked education and was totally

unaware of his public responsibilities. It was easy enough therefore for the Bolsheviks to satisfy the peasants by allowing them to appropriate the domain of the large landowners without fear of being interfered with in their despotic rule.

Two Classes of Population.—Broadly speaking, the population of Russia consisted of two classes only : the small minority composed of the nobility, the military, the bureaucracy, the clergy—and the other educated classes, so-called " Intelligenzia "—and the great majority composed of the agricultural class, the peasants who maintained the whole State by the taxes they had to pay. An educated self-conscious middle class, the mainstay of public life in every State like the British gentry, the French bourgeoisie or the German Bürgertum, was completely lacking. Russia was, and is, a peasant-State where 90 per cent. of the population are simple peasants.[1] These two classes did not understand each other, they lived in different mental worlds. The educated man had little in common with the simple mujik permeated by thoughts of primeval backwardness ; the State officials, the Tchinovniks, were in the eyes of the Russian peasant strange and unattractive figures, looked upon with the same hatred as were the Tartar tax-collectors of old, the " baskaks." Thus it is evident that Russia amongst all the European States was the *locus minoris resistentiæ* for extreme socialism ; the very thin layer of educated people could, on account of its small numbers, easily be suppressed by murder, starvation, exile and terrorism, whilst the great bulk of the people was politically amorphous and without the pretension of having a voice in the management of the State—brutalized, so to say, by centuries of abject submission to autocratic rule ; this inordinate mass of peasants was therefore easily silenced. Looked at from this point of view, Bolshevism appears therefore as the result of a latent organic social disease which broke out when Russia was weakened by war. It is significant enough that in the last hundred years, after each war, a social crisis has shaken the whole fabric of the Empire. After the Napoleonic invasion, the " Dekabrist " revolution of 1825 almost emancipated Russia from autocracy ; after the Crimean war the abolition of serfdom became necessary ; the Balkan war of 1877–78, with its great losses and meagre results, engendered Nihilism ; the iniquitous Manchurian war was followed by the revolutionary disturbances of 1905 and finally the Great War, the most appalling hecatomb of human life and economic treasure, had its repercussion in Bolshevism, the most gigantic of social disasters.

Thus the causal nexus between the past and present is only too manifest. The reign of the last two Romanoffs, Alexander III and Nicolas II, stood under the baneful influence of a maniac of autocracy, Pobjedonostseff, the Procurator of the Holy Synod. It was he who pretended that

[1] Before the War the population of Russia consisted of 178 million inhabitants, of which 160 million were peasants. According to official Bolshevist figures for 1920 only 32 out of every hundred persons in Russia could either read or write.

the autocratic form of government based on theocracy should be indefinitely maintained in Russia in the face of the progress of the western civilized world. Like China, Russia remained so long stationary that peaceful evolution became impossible and revolution ensued as a matter of course.

Neglect of National Education.—It appears therefore that the chief cause of the Russian disaster lies in the neglect of a sound national education. Whilst all over the civilized world, from the dawn of the eighteenth century, knowledge was recognized as necessary and elementary education was made compulsory in a system of State-endowed and State-directed national schools,[1] Russia persisted in the preconceived neglect of the education of her masses. Any attempt at educating the masses was thwarted by lack of finance. If the enormous sums of money provided for in the Budget for military purposes had been spent on instructing the masses, Russia would, to be sure, have avoided the present disaster which has befallen her. Russian bureaucracy suffered from the ridiculous and fatal fear of diffusing knowledge amongst the people much as the Bourbon kings of the two Sicilies encouraged ignorance and superstition among their own subjects under the supposition that it is easier to rule over illiterate masses than to keep educated people in control. The whole trend of the Russian revolution has now solved this controversy. The masses of Muziks and Tovaristschi (peasants and revolutionary compeers), more easily fell a prey to extreme Socialism and anarchy since their utter lack of education prevented them from discerning the fallacies of such subversive doctrines. They formed an inert material in the unscrupulous hands of socialistic wire-pullers.

Character of the Russian People.—But still another cause for the triumph of Bolshevism lies in the character of the Russian people themselves. Generally speaking, they possess great mental capacity, they are conspicuous in literature, the arts and science, but they are lacking in energy, self-control and unity and are incapable of maintaining a steady line of conduct owing to an enthusiasm for criticism and a mania for contradiction. Russian mentality is more destructive than constructive. The Russian Intelligenzia during the last generation has incurred a heavy responsibility in that they have systematically undermined the principle of authority by acrimonious ill-will and criticism, without promoting

[1] For instance, in Great Britain the State assumed responsibility for elementary instruction in 1870. In France, the Constitution of 1791 provides "that there shall be created and organized a system of public instruction common to all citizens and gratuitous in respect of those subjects of instruction that are indispensable to all men." In Prussia, education was centralized under a governmental bureaucracy and compulsory attendance prescribed in 1825. Again—the Constitution of Massachusetts of 1780 provides that "it shall be the duty of legislators and magistrates to cherish the interests of seminaries, public schools, and grammar schools in the town."

At present every civilized country possesses State-supported and State-directed national schools.

positive values for carrying on public life. Leo Tolstoy opposed Church, State, patriotism, art, law, science and the principle of civilization. The negation of any upbuilding principle is peculiarly Russian. Dostoievsky wrote : "Nihilism has made its appearance amongst us because we are all Nihilists." Stepniak Bakunin, Alexander Herzen, Krapotkin are amongst those who promoted anarchy. The first three national Dumas were inspired by purely negative ideas. Such shortcomings, however, are due more to youth and inexperience than viciousness, and will certainly be put right in course of time. Furthermore, the quality of devotion in the Russian people will serve as a relieving feature. After the cruel persecution to which their religion has been subjected by the Bolsheviks, a religious revival has set in which is bound to sweep away the atheism of their present-day rulers and all their system of iniquity.[1]

These then are the root-causes which have brought about Bolshevism in Russia. To this retrospect, let us enjoin a forecast.

Bolshevism a Reactionary Movement.—The Bolsheviks profess to carry on a proletarian and peasant class-rule ; class-rule is bad enough —what is worse is that those in power have not been elected either by the proletarians or the peasants ; they live by tyranny administered by intimidation and force alone ! Out of the 15 million labourers in Russia, only 350,000 are Bolshevik, together with a very small number of peasants ; the majority of the Bolsheviks are bourgeois. The great majority of them are mere adventurers, or simply those who make a living out of the fact of being members of the ruling class. Douillet in his book, *Moscou sans voiles*, makes the pertinent remark that, "he did not meet a single communist who was convinced of the theory of Leninism." The Bolsheviks are only 0·5 per cent. of the total population of Russia, and what is even more characteristic for their oligarchy is the indisputable fact that the "Politbureau," or the highest authority, which is supported by the all-powerful Inquisition, called the Guépéou, consists in the main of aliens. Lenin was a Kalmuk, his wife was a Jewess and his successor, Staline, is Georgian, bearing the name of Djougaschvili. Thus Russia is at the mercy of international bandits. Bolshevism is in its essence not only an autocratic but also a reactionary movement. The Russian historian Klutchevsky[2] quotes the Jesuit Possevin,[3] Fletcher,[4] and Collins,[5] foreign travellers in Russia in the sixteenth century, as having

[1] At the Congress of the Communist Youth Organization Bukharin stated that, "the sectarian bodies have organized a whole series of youth leagues whose total membership is about equal to that of our communist youth" and that these sects were "gaining ground among peasant and worker youth of both sexes." (*New York Times*, May 14, 1928.)

[2] B. Klutchevsky : *Impressions des étrangers sur la Moscovie.* Moscou, 1866.

[3] 1581 and 1592, Antonie Possevini, Societatie Jesu, Moscovi of Antverpia, 1587.

[4] 1588 and 1589, Fletcher, *L'État moscovite.* London, 1591.

[5] Samuel Collins, Englishman, having lived nine years at the Court of the Tzar.

reported that the Tzar was the chief merchant of the country, exercising a monopoly after the style of the Bolshevik Government of to-day. It was the Tzar who carried on trade with abroad and who also engaged in commercial operations at home, buying wholesale and selling retail with great profit. The Crown exported huge quantities of foodstuffs and raw products, importing in exchange finery, silks and industrial goods. Private traders were only allowed to do business with the permission of the Tzar and then only when his stock of merchandise was exhausted. Bolshevism has taken its cue from this patrimonial and archaic system of Government, being nothing else than an anachronistic replica of Russian affairs in the sixteenth and seventeenth century.

Economic Situation.—The economic situation of the country under Bolshevik rule is disastrous. The only way for the development of industry and manufacture in Russia lies in the increase of the export of corn and other raw products. But in spite of a famous speech at Moscow, in which Lenin declared that to give the peasants the faculty of selling their corn and the possibility of speculating would mean the disruption of the revolution itself—the peasants prefer to retain their stock of agriculture and to curtail its production as long as they are not sure of getting the industrial goods of which they stand in need, and the new economic policy called the " Nep " even gives them the right to do so. In the latter part of the year 1927, the Soviet Government obtained from the peasants only 4·1 million tons of corn, whilst in the same period of the preceding year, 1926, the Government acquired 5·5 million tons. Owing to this critical situation, the Soviets have resorted once more to the seizure of corn from the peasants, in defiance of their right to private trade, accorded to them by the so-called New Economic policy. Peasants who were found to possess reserves of corn were prosecuted as speculators, on the strength of s. 107 of the Criminal law. Furthermore, peasants are deprived, nowadays, of the private ownership of land, in favour of common village ownership.

The problem of feeding the town population and of exporting corn becomes more and more urgent. Prior to the War, Russia exported annually about 15 million tons of grain, whilst at present the export from Russia only amounts to 42 per cent. of pre-war exportation. On the other hand, industrial products in the country are more than twice as expensive as those procurable from abroad. For instance, the cost of producing copper at the Kyshtim works, expropriated from the Company by the Soviet Government, was during the past year £99 per ton as against £28, prior to expropriation. Can there be any more significant proof of the utter failure of the Soviet economic system ? The Russian Government cannot get out of this dangerous situation otherwise than by finding credit abroad which, at present, is non-existent. In this predicament, the Government proposes to take refuge in trickery. The *Pravda* newspaper gives the following advice :

It is necessary to export even if prices abroad are much lower than those at home. The commercial benefit of such an operation is not so risky as one might be inclined to believe. If, for instance, we sold abroad 100 million roubles' worth of goods obtaining for them only 75 or 80 million roubles, a loss of 20 to 25 million roubles would be incurred thereby. It would be possible, however, to make good this loss if 5 or 6 millions derived from this disadvantageous operation were utilized for buying foreign goods which could be introduced into the home market by raising the price from 400 to 500 per cent. In this way it would be possible to cover the loss incurred and to insure the entrance of foreign currency in proportion to the whole amount of the exportation.

These, therefore, are the methods of Soviet capitalism, which can hardly be considered as an improvement on the moral status of individual capitalistic commercialism prevailing in the rest of the world. Far from having suppressed capitalism, the Soviets have but made it more objectionable by the fact that capitalistic commercialism is carried on by the Government itself, viz., by an agency which at any time has the power of forcing the buying public to submit to their extortionate, dishonest trading and usury. Between the individual and State as capitalist, there is this fundamental difference, that the State is able to indulge in objectionable abusive practices with impunity, whilst the individual is controlled by the State and is liable to be taken to task for trespassing the law. The nationalized capitalism of the Soviets sanctioning dealings of a doubtful nature, makes matters worse. As this form of capitalism is part and parcel of the whole system of the Soviet Government, it contains in itself its own condemnation.

Concessions from Communism.—Since its inception, Bolshevik rule has made different concessions from the communistic point of view proving thereby that Karl Marx's theory is a romance—not to say a nightmare, out of gear with practical possibilities. Each time a new makeshift is applied a propaganda sets in abroad pretending that Bolshevism is evolutionizing towards a workable proposition of government. Minor concessions of Bolshevik rule in order to carry on a little longer are preconized in a way which is out of proportion with their real significance, so as to " throw dust into the eyes " of Governments and capitalists whose money is wanted to buttress Bolshevism in Russia. Too much importance is attached to these concessions: for instance, in regard to the new economic policy called the " Nep "—to which I have already referred—private retail trading is allowed although wholesale trade and commercial intercourse with abroad is still under the complete control of the Soviet Government—nevertheless, in its main features the Bolshevik régime remains true to its origin. Thus foreign capitalists must reckon with the possibility that their industrial enterprise in Russia may be taxed no less than Russian industrial establishments, up to 100 per cent. of their net revenue, a proposition tantamount to expropriation.

Bankruptcy of the Principle of Communism.—There is an unbridgeable abyss between Bolshevist rule and civilized democratic government; both exclude each other by their very essence and intention, therefore no evolution from the one to the other is even imaginable. Which way then do the scales turn in Bolshevism? In foreign affairs a fiasco of communistic propaganda in China and elsewhere; a complete breach with England, strained relations with France; at home, failure in the nationalization of industry, increase of the number of unemployed, the feeding of the population in the towns rendered more and more difficult, the peasants growing more and more dissatisfied notwithstanding the promises held out to them to induce them to increase their agricultural output: misery and disorganization everywhere, safety and freedom nowhere!—amongst the leaders, mutual excommunication, the Opposition divided against itself—one party for returning to Leninism, the other for further concessions to private capitalism! Was there ever a Government in a greater plight? Was there ever a more complete bankruptcy of the principle of communism intended in its outset to reorganize the "rotting west." As Mr. Hoover has so rightly remarked, "No greater fortune can come to the world than that the foolish Bolshevik ideals should have an opportunity of bankrupting themselves somewhere."

Future of Russia.—In the past it was Russia that preserved Europe from being over-run by the Tartar hordes—and now she has once more been crucified, this time by the Bolsheviks, for the salvation of Europe. It is, however, impossible to foresee with any amount of certainty when Bolshevism will have exhausted itself. We may only be sure that an autocratic régime desiring to abrogate religion, morality, patriotism and family ties cannot have any permanency. A resurrection of the country may come from the retail traders with the aid of the richer "Kulaki," the peasants who are becoming conscious of forming the nucleus of a new bourgeoisie, a coming middle class. Bolshevism in Russia will, to be sure, be checked in course of time as has been done in Austria, Bavaria, Italy and China, by the counteraction of patriotism. It cannot be supposed that the Russian peasant will always remain in his comatose state of resignation and indolence regarding public and State affairs, due to the Tartar yoke and centuries of a régime of stagnation, superstition and terrorism. Russia has indeed had a tragic past, having been prevented from developing on the same lines as other Indo-European nations. But still she has a great future in store, and, if I am not mistaken, America is predestined to play a great rôle in her resurrection by bringing to bear on Russia American enterprise and capital, when Bolshevism will have found its inglorious end.

Publications on Bolshevism.—Publications on Bolshevism are very numerous, but those serving the propaganda of the Bolsheviks, as for instance, the Vanguard press at New York, are irrelevant to seekers of truth. Likewise are the reports of many travellers in Russia who are

systematically prevented by the Bolsheviks from gaining an insight into the real state of affairs of the country. On the other hand the publications of practical experts are worth reading. For instance, Douillet, consul for Belgium, having lived nine years in Soviet Russia and possessing the Russian language perfectly, has written a book entitled *Moscou sans voiles* (Paris, 1928), which is a first-class documentary proof. Jacques Lyon's book, *La Russie soviétique* (Paris, 1927), gives a tolerably impartial description of present-day Russia. The book of the Danish professor, Karlgeen, on *Bolshevism in Russia*, written in the English language, is also a useful contribution, and finally, the publication of Pitirim Sorokin, late professor at the university of Leningrad, a man who is no reactionary, writing about the sociology of revolution, can be recommended to Russian scholars: there is also a German translation of this book: Munich, 1927.

PRODUCE POOLS IN AUSTRALIA—II.

[*Contributed by* PROFESSOR F. R. BEASLEY, *of the University of Western Australia.*]

Pools During the War and After. Wool.—Wool has for many years held pride of place among Australian exports and in primary production generally; during the last twenty years the aggregate value of the wool clip has vastly exceeded that of the wheat crop—the next important export. In two seasons only of that period—1915–16 and 1920–1—did wheat surpass wool in value as the result of unusually large harvests; if present prices are maintained wheat is not likely to overtake wool again for some years, the figures for 1925–6 being approximately £72,000,000 for wool as against £53,547,185 for its chief competitor. Australia, too, led the world in numbers of sheep for many years until the drought of 1914 caused her to drop back to second place in 1915 and to third place in the following year; her supremacy was regained in 1917 and has not since been challenged. In another respect also wool is unique; it attracts buyers from other countries instead of having to seek an outlet in the competitive markets of the world. For some time prior to 1914 from 70 to 90 per cent. of Australian wool was sold, before export, at the sales held in Sydney, Melbourne, Geelong, Adelaide, Brisbane, Fremantle, Hobart and Launceston, and of the total exports some 40 per cent. or more went to the United Kingdom. These two factors led to considerable dislocation of the wool trade in the early months of the War; German and Austrian buyers disappeared from the market, the continental demand—always heavy in normal seasons—dwindled away to nothing, and the export of wool to America was prohibited under the Customs Act. With the lifting of the embargo on shipments to America and a growing demand for crossbred wool to keep pace with army requirements, the position became easier, and prices not only recovered but were above the average by the end of the season. The 1915–16 season opened inauspiciously; there was little demand from Yorkshire and practically no continental competition to give life to the market; fortunately buyers from America, Italy and Japan came to the rescue and the market again showed high prices towards the end of the season. It was already becoming apparent, however, that supplies could not be brought indiscriminately into the market, partly because of the weakness of United Kingdom buying and partly because of the difficulty of obtaining freight space. New South Wales and Victoria mutually agreed to restrict offerings in proportion to

the demand; Adelaide and Brisbane fell into line, and an even course of selling was thus rendered possible throughout the whole season. The 1916–17 season opened very quietly; at this time the British Government had come to realize the importance of controlling the whole of the Australian wool production in order to secure ample supplies for the military purposes of itself and its allies and to prevent any portion of the clip from finding its way into enemy hands. Negotiations were commenced between the Imperial and the Commonwealth Governments, as a result of which the first Wool Pool came into existence; the balance of the 1916–17 clip was sold to the British Government at the flat rate of 15½*d.* per lb. "greasy" plus 50 per cent. of any profits realized on re-sale. The sale of wool was again prohibited, and the "Commonwealth of Australia Central Wool Committee," composed of representatives of the growers, buyers, selling brokers, manufacturers, wool-scourers and fellmongers, with a Government nominee as chairman, was formed under the War Precautions Act Regulations to control the scheme, which involved the relative "appraisement" or classification of some 1,800,000 bales of wool so that the whole should average the contract price of 15½*d.* per lb. This work was performed by a technical advisory committee which divided the clip into no less than 848 distinct types, each of which was valued in relation to the contract price. In every State a sub-committee was created on the same lines as the central body to handle the local organization of the scheme. The general outline was prepared by the Central Committee; the details were left in the hands of those most accustomed to the wool market, namely, the trade organizations, who were represented on the State committees. The normal course of preparing, cataloguing and showing the wool was followed, but instead of being sold at auction it was appraised by Government representatives and thereupon became the property of the Imperial Government, to be shipped as freight space became available. This method of handling the clip proved so successful that it was continued until June 19, 1920, the whole of the wool shorn in that period becoming subject to the Imperial purchase scheme. In this way continuity of production was assured at the most critical period of the War, the solvency of the pastoral industry was guaranteed and local manufacturers were given an opportunity of expansion by which they did not fail to benefit. The financial arrangements worked very smoothly; within fourteen days after each series of appraisements 90 per cent. of the appraised price had been paid to the grower out of funds provided by the Imperial Government, the balance being retained against possible adjustments and in the meantime being put out at interest. During the continuance of the scheme the Central Wool Committee handled 7,156,616 bales of wool, the value of which, plus charges from warehouse to ship's hold, was £166,977,382, details being as follows:

TOTAL QUANTITY, ON GREASY BASIS, OF WOOL APPRAISED.

Season.	New South Wales.	Victoria.	Queensland.	South Australia.	Western Australia.	Tasmania.	Commonwealth.
	lb.	lb.	lb.	lb.	lb.	lb.	lb.
1917 (*a*)	158,412,247	112,369,332	70,316,116	23,337,744	18,353,414	9,579,648	392,368,501
1918 .	263,375,038	168,533,204	118,689,484	62,075,970	41,473,524	10,146,213	664,293,433
1919 .	269,536,025	201,017,291	114,781,383	62,873,893	46,030,078	10,521,018	704,759,688
1920 .	266,347,330	205,852,590	124,659,489	73,032,403	44,029,729	11,286,635	725,208,176
Total .	957,670,640	687,772,417	428,446,472	221,320,010	149,886,745	41,533,514	2,486,629,798

(*a*) Portion of clip only.

At normal times the shipping of that quantity of wool would present few difficulties; but as the scheme progressed freight space became more and more scarce and wool began to accumulate in the stores. When the wool market again became free there was a considerable carry-over from the Imperial purchase which had been paid for on appraisement but had not been sold by the purchaser, the Imperial Government. This was largely due to the scarcity of shipping, as already stated, and in a less degree to the fact that even with its requirements vastly increased by the War the United Kingdom could not absorb in each year from Australia a quantity of wool more than double that received from the Commonwealth in times of peace. The 1920–1 season commenced with growers and merchants full of optimism now that the wool trade had returned to its normal channels; but although the European countries were in great need of wool, currency depreciation had commenced and was preventing them from buying on a satisfactory scale owing to the great cost of conversion. The presence in the wool stores of nearly two million bales from preceding seasons—the balance of the imperial purchase—was more than likely to make the realization even of reasonable prices difficult, and the uncertainty of the market was shown by the 1920–1 sales—791,409 bales, valued at £13,114,997, compared with 2,045,912 bales, valued at £46,192,087, in the preceding year. Evidently some form of pool was still necessary for the salvation of the pastoral industry, and the means was found in "Bawra," the British Australian Wool Realization Association Limited, which was brought into existence at the end of 1920 for the purpose of selling not only the balance of the 1920–1 clip but also the remainder of the imperial purchase. Of Bawra's £22,000,000 capital, which was represented by cash, wool and other assets, the sum of £10,000,000 was issued in the form of priority wool certificates and the balance in fully paid shares of £1 each; the recipients were the suppliers of wool during the British purchase in proportion to the appraised value of the wool contributed by each. Bawra was also entrusted with the sale of some 80,000 other bales of South African wool owned by the British Government. In the first eighteen months of its existence Bawra sold 1,391,221 bales in England and on the Continent, and during the same period the whole of the priority wool certificates had been

redeemed by cash payments in July 1921 and May 1922. The season 1921–2 opened with a large new clip coming forward and Bawra still holding 1,300,000 bales ; fortunately the peak of the post-war depression had been passed, the exchanges were improving, and the restricted manufacture of the preceding year meant a correspondingly greater demand now that industry was recovering. The Australian selling centres did a very brisk business with the new wool and the balance of the 1920–1 clip, practically all of which had been sold by June 30, 1922, at figures which proved that merino wool could command prices proportionate to the decreased value of money and the increased cost of production. The season 1922–3 opened cheerfully ; sales were less than those of the preceding season by 294,443 bales, but the amount realized showed a total increase of £8,942,078, English, continental, American and Japanese buyers operating strongly in all classes of wool. Meanwhile Bawra, working in conjunction with the Australian markets, disposed of 777,500 bales in the period July 1, 1922, to June 30, 1923, closing the year with 523,000 bales in hand ; the end was now in sight. In spite of the fact that world conditions were far from favourable to a repetition of the prices ruling in 1922–3, values in 1923–4 actually exceeded those of the earlier year ; consumption had at last overtaken production, and at the same time the Australian clip was smaller owing to unfavourable conditions during the year. The quantity of wool again sold showed a decrease, compared with the previous year, of 234,174 bales, but the amount realized increased by £7,066,573 to £53,305,374. During this time Bawra was still proceeding steadily towards the disposal of the last of its stocks, and on May 2, 1924, it held its final auction sale at Liverpool, having since its inception sold 2,691,756 bales in three years and six months (at prices averaging more than the contract figure of 15½*d.* per lb.) concurrently with the wool coming forward in each season. It went into voluntary liquidation two years later, and after this brief but highly successful career was able to show the following result :

Amounts already distributed :

	£ s. d.	£ s. d.
Five per cent. dividend	7,686,283 3 5	
Priority wool certificates and capital reductions	21,407,602 19 0	
		29,093,886 2 5
Payable on liquidation :		
Capital account at 1s. per share	592,402 1 0	
Surplus, December 31, 1925	5,446,034 10 3	
		6,038,436 11 3
Amounts held in trust :		
Skin wool trust (pending settlement of liquidation)	1,583,189 16 7	
Wool-selling brokers' trust	317,666 9 8	
		1,900,856 6 3
		£37,033,178 19 11

The skin wool funds having been transferred to Bawra's assets, it was announced on May 5, 1927, that the first liquidation distribution would be made on November 15, 1927, the amount available making possible a payment of 13*s.* 6*d.* per share, which represents the final capital payment of 1*s.* 0*d.* per share and a liquidation payment of 12*s.* 6*d.* per share.

Details of Bawra's operations are shown in the following table, which also gives the amount sold concurrently through the usual trade channels :

	Stocks January 1, 1921.	Disposals (in bales).				
		1921.	1922.	1923.	To May 2, 1924.	Total Disposals.
Australian :						
Merino . . .	904,180	484,031	345,710	73,694	89	903,524
Crossbred . . .	931,825	176,199	274,632	319,146	162,297	932,274
New Zealand :						
Merino . . .	3,181	449	267	2,333	132	3,181
Crossbred . . .	769,762	138,441	275,855	308,428	47,069	769,793
Falkland Islands . .	2,329	2,329	—	—	—	2,329
South Africa (*a*) . .	80,550	—	80,655	—	—	80,655
Totals . .	2,691,827	801,449	977,119	703,601	209,587	2,691,756
Sales through usual channels . . .	—	791,409	2,226,758	1,932,315	1,698,141	6,648,623
Grand Totals . .	2,691,827	1,592,858	3,203,877	2,635,916	1,907,728	9,240,379

(*a*) January 1, 1922.

Note.—The discrepancy between commencing stocks and disposals is explained by reclassification and reconditioning.

Wheat.[1]—In a normal season the greater part of the Australian wheat crop is exported, about 75 per cent. of the exportable surplus going to the United Kingdom. This enforced dependence upon foreign outlets inevitably means dislocation of the wheat trade when abnormal conditions such as war interrupt the flow from producer to consumer. Farmers realized this when the Commonwealth Government, acting in pursuance of powers contained in the Customs Act, prohibited in 1914 the export of wheat except to the United Kingdom after September 7 ; on September 23 the embargo was extended to the United Kingdom, but could be lifted in particular cases with the consent of the Minister for Trade and Customs, the prohibition being intended to minimize the possibility of cargoes of Australian wheat reaching an enemy destination even indirectly. Before long the Governments of the wheat-producing States—New South Wales, Victoria, South Australia and Western Australia—decided to introduce legislation for the purpose of expropriating, if thought necessary, all wheat owners within their respective jurisdictions. By the Wheat Acquisition Act of 1914 New South Wales made void all contracts relating to New South Wales 1914–15 wheat for delivery within the State, and empowered the Executive to declare

[1] The writer gratefully acknowledges his indebtedness to Mr. G. Boehme, of Dalgety & Co., Ltd., Sydney, for much valuable information on the subject of wheat marketing.

any wheat as having been acquired by the Crown; the amount of compensation payable for such acquired wheat was to be 5*s.* 0*d.* per bushel of f.a.q. wheat at railway sidings, with the addition of such sum as the Commissioners appointed under the Necessary Commodities Control Act might deem reasonable. Victoria followed suit with a Wheat Marketing Act early in 1915, prohibiting all sales of wheat except to the Minister or his agents and empowering the Minister to buy and sell wheat and make suitable arrangements with the banks to finance his purchases. Later in the year South Australia's Wheat Harvest Act enabled owners voluntarily to hand over their wheat to the Government for sale, very wide discretion being given to the Minister as to the time of sale and acceptance of the price offered. Power was also given to the Crown to acquire any wheat, which was then to be sold and paid for as if it had been surrendered voluntarily. Both Victoria and South Australia followed the New South Wales example and declared void contracts relating to each State's wheat for delivery within its respective confines. Western Australia passed a Grain and Foodstuff Act which was similar in principle but different in detail; a Board appointed under the Act was given power to purchase or requisition any grain at a price to be determined by agreement within fourteen days after acquisition, or failing agreement at a price to be fixed by the Commission appointed under the local Act for the control of trade in war time. Payment had to be made within two months from the time of acquisition. Not all the wheat grown in the States was pooled under these arrangements, which gave way in 1915 to the co-ordinated plan set up in December of that year by agreement between the Commonwealth and the four wheat-producing States for the collective marketing of the 1915–16 and subsequent harvests. The scarcity of shipping made it essential that some arrangements should be made to prevent ruinous competition between States for the limited freight space available, and the newly constituted "Australian Wheat Board" was given sole power to dispose of wheat, and to ship it abroad in collaboration with the government-appointed chartering agents. The pool was originally intended to meet the needs of the moment only, but its operations were subsequently extended to cover all the harvests up to and including that of 1920–1. Its main objects were to secure a fair return to the growers and to allot freight space to the States in accordance with the exportable surplus which each brought to the pool; local sales also came within the scope of the Board's activities. This Board, which was assisted by local commissions in each State—the Minister for Agriculture and his departmental officers—was composed of the Prime Minister of the Commonwealth and a Minister from each State, and it had the benefit of the advice of representatives of the leading exporting firms, the government agents in the States, the chartering agents and the associated banks. The selling of the wheat was in the hands of a London Board comprising the High Commissioner of the Common-

wealth and the Agents-General of the States, working in co-operation with the London representatives of the Australian wheat-buying agencies.

The Board was able to commence work with a clean sheet ; the 1914–15 crop had dropped to the low figure of 24,892,402 bushels as the result of drought, and only 4,210,593 bushels had been available for export. The 1915–16 crop, however, constituted a record, reaching a total of 179,065,703 bushels, which has never since been equalled ; at a time when selling and transporting presented serious problems, the task of the Board was by no means easy, and to finance the disposal of such a large crop necessitated the revision of banking arrangements in order that farmers might not be kept waiting for their money, whereas the Board could not expect to commence receiving the proceeds of its sales for some time at least after the wheat had been delivered to it by the growers. It was arranged that the farmer should receive a wheat certificate from the Government agent appointed to take delivery at country railway sidings, and that these certificates, up to the amount of the first advance per bushel which the Board decided to make, should be payable at any bank named by the grower ; Victoria and South Australia endeavoured to induce farmers to refrain from cashing their certificates by allowing interest thereon at 5 per cent. per annum, but their example was not followed in New South Wales or Western Australia. The distribution of the liability between the banks was made on the basis of the pre-war wheat financing done by each institution ; interest on the overdrafts thus created was payable at the rate of 5 per cent., and the Government of each State gave an undertaking, supported by the guarantee of the Commonwealth authorities, to repay to the banks all advances made on behalf of each State respectively. The initial advance required from the banks in the first year of the pool was 3*s.* 0*d.* per bushel, 2*s.* 6*d.* to the grower and 6*d.* to the Board for its necessary expenditure.

The 1915–16 harvest had been unprecedented ; the 1916–17 crop amounted to 152,420,189 bushels, and thus surpassed all previous figures except those of the record year. As a result there was a very serious accumulation of wheat, and a quicker rate of selling became vitally necessary ; the Commonwealth Government thereupon decided to place on offer to the Imperial authorities the largest quantity of wheat ever sold as one lot, namely, 3,000,000 tons, at a flat rate of 4*s.* 9*d.* per bushel f.o.b. Australia. The offer was accepted, and the total purchase price, £26,000,000, was paid in nine instalments of £2,000,000 per week commencing in February 1917 and eight instalments of £1,000,000 per week starting on September 1 of the same year. In the meantime local sales to the value of approximately £500,000 and foreign orders amounting to £125,000 were being made and executed each month ; there was also a special sale to the French Government for £1,500,000, payable in London. At a still later date another large transaction was entered into with the British Wheat Commission, 1,500,000 tons being sold at 5*s.* 6*d.* per bushel, giving an aggregate value of £15,400,000.

The total value of pooled wheat sold by the Board from its establishment to May 29, 1922, when it ceased operations, was £187,953,000, of which oversea shipments accounted for £127,761,000. The amount of wheat pooled in each State and the advances to growers were as follows:

WHEAT POOLED IN EACH STATE.

State.	1915–16.	1916–17.	1917–18.	1918–19.	1919–20.	1920–1 (to May 29, 1922).
	Bushels.	Bushels.	Bushels.	Bushels.	Bushels.	Bushels.
New South Wales .	58,186,000	32,042,000	33,714,000	13,892,000	461,000	51,417,000
Victoria .	59,177,000	50,407,000	36,233,000	23,029,000	12,349,000	38,953,000
South Australia	29,890,000	42,006,000	25,876,000	20,475,000	12,694,000	32,256,000
Western Australia .	14,929,000	13,822,000	7,529,000	7,624,000	9,707,000	10,740,000
Total .	162,182,000	138,277,000	103,352,000	65,020,000	35,211,000	133,366,000

POOLED WHEAT ADVANCES PER BUSHEL.

State.	1915–16 (*b*).	1916–17.	1917–18 (*a*).	1918–19 (*a*).	1919–20 (*a*).	1920–21.
	s. d.	*s. d.*	*s. d.*	*s. d.*	*s. d.*	*s. d.*
New South Wales .	4 10	3 3	4 3	4 11	7 10	7 10
Victoria . .	4 10·6	4 2½ (*a*)	5 1	5 5	8 0	7 3
South Australia .	4 7½	3 3	4 9	4 9	8 9	7 3
Western Australia .	4 7·8	4 1½ (*a*)	4 9	4 9	9 4	7 3

(*a*) Less rail freight. (*b*) Less rail freight and handling charges.

The Australian Wheat Board went out of existence after the 1920–1 harvest had been realized, but pooling still had its attractions for some. The New South Wales Government was early in the field with a proposal to continue the Wheat Board system for marketing the 1921–2 crop, but the other States were lukewarm, and in New South Wales itself the Legislative Council rejected the enabling Bill which the Government had introduced. Prior to this, however, a ballot amongst primary producers in New South Wales had resulted in an overwhelming majority in favour of a pool "controlled by representatives elected by ballot by the wheat-growers." On the rejection of the Government's Bill for a compulsory pool a voluntary pool was organized by the growers themselves, which the Commonwealth Government agreed to finance on the basis of an advance of 3*s.* 0*d.* per bushel to the farmers and of 8*d.* per bushel to the pool for necessary expenses. Two-thirds of the growers, producing 53·4 per cent. of the total harvest, sent their wheat to the pool, which was able to pay to the farmer an average net price of 4*s.* 7·81*d.* per bushel at railway sidings. Similar arrangements were made to deal with the 1922–3 harvest; on this occasion the quantity of wheat pooled fell to 40·8 per cent. of the total crop, the average net return at railway sidings being 4*s.* 3·32*d.* per bushel. In 1923–4 the pool was continued, but the percentage of pooled wheat became still lower, being only 33; in 1924–5, in which season the Colonial Treasurer of the State guaranteed the repayment—up to 80 per cent. of the net

value of the wheat pooled—of advances made by the Commonwealth Government, pooled wheat amounted to 25 per cent. only of the harvest. Memories of war-time restrictions were becoming less vivid, and the farmers were slowly returning to the "open market" system, which established its complete ascendancy in 1925–6, when the pool received only 740,600 bushels out of a total crop of approximately 34,000,000 bushels, or 2·2 per cent. At the present time the voluntary pool is not operating; legislative provision has been made this year, by the Marketing of Primary Products Act, for the compulsory pooling of any "product" as defined in the Act, provided that (1) at least two-thirds of those engaged in the particular industry shall vote on the question, and (2) not less than two-thirds of the votes cast shall be in favour of a compulsory pool. A non-voting producer is liable to a fine of not less than £2, but it is doubtful whether even the existence of such a penalty is sufficient to secure the necessary quorum of voters, and it is equally open to argument that the requirement of a two-thirds majority is an insuperable obstacle in the way of compulsory pools under the Act. On the other hand, if a Marketing Board is established at any time, it can be abolished by a simple majority of those producers who are sufficiently interested to vote on the question. In June 1927 a petition was signed by more than two hundred growers—the petitioners numbering more than the minimum required by the Act—asking that wheat be declared a "commodity"; the next step is for the Governor to proclaim a polling day, of which not less than fifty days' notice must be given. No proclamation has yet been issued, probably by reason of the political crisis and the dissolution of Parliament.

Voluntary pools have also been in existence in Victoria since 1921, the financial arrangements being the same as in New South Wales; they too have experienced a progressive decline in favour, the amount of wheat pooled as compared with the total harvest being 78 per cent. in 1921–2, 66 per cent. in 1922–3, 60 per cent. in 1923–4, 34 per cent. in 1924–5, and 13 per cent. in 1925–6, the last year for which figures are available. In South Australia the story has been the same; 30 per cent. in 1921–2, 44 per cent. in 1922–3, 33 per cent. in 1923–4, and 12·5 per cent. in 1924–5, with a somewhat surprising recovery to 19 per cent. in 1925–6.

The fourth great wheat-producing State, Western Australia, which bids fair to overtake and even outstrip its eastern rivals in production at no distant time, has experimented with several methods; in the first year after the passing of the Australian Wheat Board it continued the compulsory system with a pool administered by the Minister for Agriculture, 96 per cent. of the marketable wheat going into the pool, which realized for the farmers an average net return of 4*s.* 10*d.* at railway sidings. In the following year Western Australia abandoned compulsory methods in favour of the voluntary system and succeeded in attracting 81 per cent. of the marketable wheat into the pool; this achievement was not repeated in 1923–4, when the percentage dropped

to 40. The voluntary system was given a further trial in 1924–5, but a novel departure was made in the financial arrangements; instead of receiving advances from the Commonwealth Government, as did the other States, Western Australia was financed by the Co-operative Wholesale Society Limited of Great Britain. In that year the percentage of pooled wheat rose slightly to 45. In 1925–6 the money for the pool was again made available by the Co-operative Society, but only 29 per cent. of the harvest was marketed through the pool. Greater success has been achieved in the 1926–7 pool; up to the end of April 1927 advances amounted to £3,574,000 as against £1,274,000 at the corresponding date in 1926. It was stated on April 19 that Westralian Farmers Limited had received 21,056,832 bushels, of which 17,859,550 were for the pool; other shippers received 5,600,000 bushels, so that the pool during last season controlled 59 per cent. of the total crop and 67 per cent. of the exportable surplus in a record season.

Queensland is relatively unimportant as a wheat-producing State, and was not subject to the control of the Australian Wheat Board during the War; nevertheless it has led the way in compulsory pools with an Act passed in 1920, which makes it obligatory upon the producer to deliver his wheat to the Board established thereunder. The Act is still in force, but as an example of the merits and demerits of the compulsory pooling of wheat the Queensland system is not of great value, inasmuch as production more often than not is insufficient for local needs. The figures themselves emphasize that fact sufficiently:— 3,707,357 bushels in 1920–1, 3,025,786 in 1921–2, 1,877,836 in 1922–3, 243,713 in 1923–4, 2,779,829 in 1924–5, and 1,159,237 in 1925–6. During that same period the total production of the Commonwealth has shown an annual average of approximately 132,000,000 bushels.

It is a very moot point whether the farmer obtains a better return from the pools or from the open market. When the compulsory system was in force wheat prices in Australia fell far short of the values realized in other producing countries; prices for local consumption were fixed below world parity, and as regards the exportable surplus the pooling system was forced upon the Governments by the acute shortage of freight space. The return to the farmer might well have been still lower had he been left to the mercies of the open market, which unaided could not have financed the large harvests of the war era and sooner or later would have been compelled to refuse to extend its commitments. It was then a question, not of selling in the best market, but of being able to ship the wheat to any market at all, and the only method which worked the minimum of hardship was Government control. Under normal conditions the position is entirely different; very rarely is it necessary to wait for freight space for more than a few weeks at the most at the height of the exporting season, and the only question for the grower to consider is the most profitable method to him of disposing of his crop. Figures recently published by the Australian Wheat Mer-

chants' Association show the following result for the past two seasons in New South Wales :

		Pool's Price.	Open Market.	Difference.
1924–5.	Bagged	5. 5·247	5. 9·037	3·79
	Bulk	5. 4·247	5. 7·394	3·147
1925–6.	Bagged	5. 5·43	5. 7·634	2·204
	Bulk	5. 4·93	5. 5·785	·855

Such statistics are widely quoted by opponents of the pool, who now endeavour to make the open market more attractive to the farmer by inviting him to store at the merchant's risk and giving him the right to sell whenever the ruling price appears satisfactory to him ; at the same time the merchant is prepared to make an advance to the grower at 5 per cent., a rate which is probably less than that which the pool has to pay for the funds necessary to enable it to make advances and which it must regard as an expense item when completing its figures and preparing to pay a final dividend to the grower. There is no reason, however, why pool and open market should not exist side by side and divide the harvest between them ; the merchant will then be obliged, if he wishes to do any business, to offer the best possible price to the farmer, and the pool will find that the competition of the open market will make efficient management essential to the continued existence of the co-operative method.

Meat.—Early in 1915 the Imperial Government requested the Commonwealth authorities, and in particular the States of New South Wales and Queensland, to co-operate with it in securing the whole of the exportable surplus of Australian beef and mutton for the armies of Great Britain and her allies at a reasonable price during the period of the War. The Commonwealth prohibited the export of meat except by permit obtainable from the Collector of Customs, and the States mentioned above passed Acts of identical title and import, the Meat Supply for Imperial Uses Acts, which gave to the Executive wide powers of expropriation ; the price to be paid to expropriated owners was fixed by Boards appointed under the Acts. This legislation was soon challenged (*vide supra*), but was eventually declared constitutional. The operation of the Acts was limited in time at first, but was subsequently extended by proclamation until October 31, 1920, when the British Government ceased to be a purchaser. Up to March 31, 1921, the quantity of meat purchased and shipped from Sydney had been 177,390,813 lb. of the value of £3,961,609 ; no figures are available of the Queensland exports during the same period. Control was not relaxed even after the British Government had gone out of the market, as it was necessary to arrange for the shipment of meat already purchased ; exports to countries other than the United Kingdom were allowed under permit, and the market did not become entirely free until the end of 1921 ; it has remained uncontrolled since that time. Some months ago, however, a conference of growers drafted recommendations, to be submitted to the pastoralists' associations in the various States, for the reorganization of the industry through the co-

operation of stockowners and meat exporters. A federal board is proposed with subsidiary boards in each State; no levy will be made as it is hoped that administrative expenses will be very small. Tasmania and South Australia have rejected the scheme; Western Australia has given a qualified assent subject to the administrative expenses being borne by the State Boards on the basis of the quantity of meat exported overseas by the respective States. New South Wales and Victoria have already expressed approval, and one important organization in Queensland has accepted the proposals; it now remains for several other bodies in the latter State to express an opinion. It has already been decided that if the three Eastern States approve of the scheme it will be put into operation, and it is now hoped that the new organization will have been launched before the end of 1927. No details are yet available as to the methods which the organization proposes to adopt or as to whether they will be in the nature of a pool or otherwise.

Sugar.—The cultivation of sugar has long been regarded by the Commonwealth as a matter of prime importance, and has benefited by legislative assistance for a considerable number of years. Aided first by a bounty and then by the abolition of excise, it has extended until it now provides for all local requirements and has an increasing surplus for export. On the whole the area under cultivation has steadily become greater in Queensland and smaller in northern New South Wales. In June 1915 the Commonwealth Government assumed control of the entire output, paying to growers a fixed price of £18 per ton of raw sugar, which was increased to £21 per ton in 1917; purchasing at this price the Commonwealth sold the refined product at £29 7*s*. 6*d*. per ton wholesale, the retail price being fixed at 3½*d*. per lb. Control continued on these lines until 1918, when it was renewed on the same conditions until June 26, 1920. A new agreement was then made under which the Commonwealth agreed to purchase the 1920, 1921 and 1922 crops at a price of £30 6*s*. 8*d*. per ton of raw sugar during the first year; that price was to be regarded as the minimum for the two following seasons, but an increase in the price was to be granted only if it could be shown that the cost of production had become greater by reason of the award of higher wages to the sugar workers consequent upon an increase in the cost of living. An adjustment of the wholesale price had already been found necessary earlier in the year, as the Commonwealth had been obliged by the shortage of the local crop to purchase large quantities of foreign sugar at high prices: on March 25, 1920, the wholesale price was increased to £49 per ton and the retail price to 6*d*. per lb.

After the purchase of the 1922 crop in accordance with its undertaking, the Commonwealth Government decided that the time had come for the industry to dispense with direct governmental assistance, and announced that the expiring agreement would not be renewed. It undertook, however, to prohibit the importation of black-grown sugar for two years from June 1923 (subsequently extended until August 31,

1928), provided that a pool should be formed free from all governmental control to buy raw sugar in the 1923 season at not more than £27 per ton. The retail price was to be reduced to 4½*d.* per lb. in October 1923, manufacturers using sugar in goods for export receiving special concessions; a tribunal was to be appointed to determine, after inquiry, the price of raw sugar in the 1924 and subsequent seasons, such price not to exceed £27 per ton in any event. A Sugar Board was duly established; the tribunal sat and declared a wholesale price of £27 for the 1924 and 1925 seasons, subject in the latter year to a deduction of £1 per ton to defray the expenses of the Board and to provide special concessions to certain classes of bulk consumers; at the same time the export price was fixed at £9 10*s.* 0*d.* per ton, subject to adjustment on realization. In the event the net value per ton of the exported surplus in 1925–6 was £11 5*s.* 9*d.*, and as 56 per cent. of the total production had been consumed locally, the average return for the whole crop was £19 10*s.* 7*d.* Control is still being continued on the same basis; the local price for the 1926–7 season remained unaltered, and it was estimated that the decrease in production—with a smaller quantity available for export at the lower price—would give a net average price to the grower of approximately £21 per ton.

Metals.—Prior to the War German organization was pre-eminent in the Australian base metal market, over which it had practically a monopolistic control, especially in lead, zinc and copper. It became necessary not only to cancel all contracts with enemy agencies but to take measures to put an end to the disorganization of industry which followed this cancellation. The export of metallic ores was prohibited partly to prevent their reaching an enemy destination, partly in pursuance of the Commonwealth Government's policy of endeavouring to arrange for such ores to be treated in Australia and marketed as refined products. An Australian Metal Exchange was formed in Sydney and Melbourne, the members of which must be natural-born British subjects; during the War and twelve months thereafter the Attorney-General had the right to veto a candidate for membership. No metals could be exported without the consent of the Minister for Trade and Customs during the War; after its termination provision was made that a contract for export of metals or minerals must be registered through the Exchange by an active member. With Government assistance a smelting company was formed on a co-operative basis to smelt the silver-lead ores and concentrates of its members and others; it received a virtual monopoly of this trade by reason of the refusal of the Commonwealth to relax in any case the prohibition of export of unrefined ores. One mining company in particular sought permission, which was refused, to export lead-concentrates to buyers outside the Commonwealth; its only alternative to closing down altogether was to accept the terms of the smelting company, which insisted upon having the right to take the whole of the mining company's output during a period of fifty years, and upon the

latter's taking up a parcel of shares in the smelting company, which did not, however, give it a voice in the management of the smelters. A further clause in the agreement between the two enabled the smelting company to vary its contents without the consent of the other party. When the prohibition of export was repealed after the War, litigation commenced between the two parties, the mining company alleging that it had had no option during the War but to enter into the contract, which it contended was unreasonable and in restraint of trade. The matter was settled without the necessity of having recourse to the Courts by the smelting company acquiring a controlling interest in the complainant company.

The zinc producers co-operated, on the basis of "equality of treatment" of members irrespective of volume of output, to form the Zinc Producers' Association Proprietary Limited for the purpose of controlling the sale of zinc concentrates, the Commonwealth Government being represented on the Board and provision being made for the appointment of a representative of the Imperial Government to the London Board of the Association. Zinc works were established to treat the concentrates, 40 per cent. of the output being reserved for local treatment; the Imperial Government offered the sum of £500,000, at the same rate of interest as it was required to pay to its lenders, for the purpose of financing such works. The Association made two far-reaching agreements with the London Board of Trade, the first being for the sale of all Broken Hill stocks on hand at December 31, 1917 (less certain stipulated quantities to meet local requirements and contracts with allied countries), of 250,000 tons per annum for the period of the War and one year afterwards, and of 300,000 tons, if available, for the nine next succeeding years, with an option to the Board over any surplus above the quantities specified. The second contract provided for the sale of available supplies, up to 45,000 tons annually, of spelter and electrolytic zinc for ten years as from January 1, 1918; provision was again made for local needs and foreign commitments. During the War very little progress was made in zinc smelting, and it was not until 1922 that the Australian output reached even the modest figure of 20,000 tons; in the following year, however, production practically doubled itself and has since remained in the vicinity of 40,000 tons per annum.

A Copper Producers' Association Proprietary Limited was formed in 1917, similar in organization to the Zinc Association, to control the copper output, which amounts on an average to 40,000 tons per annum, all refined in Australia. This Association at once entered into a contract with the British Ministry of Munitions for the sale of the Australian output to June 30, 1918, less local requirements and sales made under contracts then subsisting. The amount of the contract was approximately £2,150,000; a maximum of 20,000 tons and a minimum of 15,000 tons were agreed upon, the Ministry of Munitions undertaking to accept copper in excess of the maximum at a price to be determined

by agreement and to forgo its right to an action for breach of contract if the minimum were not reached, any such deficiency to be made good later at the contract price, which varied from £104 to £108 per ton f.o.b. Sydney according to description. It may incidentally be mentioned that as a result of the War the copper-producing companies combined to form a manufacturing company which was soon in a position to meet all Australian requirements in copper wire, rods, bars and strips.

Tin-smelting works had been established for some years, and are capable of handling the total output; the Commonwealth regulations enabled the local companies to deal with that portion of the output which previously had been exported for treatment. No new organization was necessary in this case.

Early in the War the Commonwealth Government entered into an agreement with the British Government whereby the latter acquired practically the whole of the molybdenite, wolfram and scheelite produced in Australia, at prices which were reviewed every year; this arrangement held good until six months after the end of the War.

The Commonwealth regulations with regard to gold were more in the nature of a buyer's pool; the export of gold was prohibited in 1915, and apart from the small demand from jewellers and dentists, the producer had no market except the Mint, which paid only the standard price per ounce. By 1919 the price of gold in other parts of the world had increased, and in that year a company was incorporated in Victoria as the Gold Producers' Association Limited, its members all being gold producers; the Treasurer of the Commonwealth agreed to permit this company to export sovereigns to the amount of the gold produced by its members and supplied to the Mint. This state of affairs continued until the embargo on export was lifted in 1925 after the restoration of the gold standard.

Future of Pooling.—To prophesy the future of pooling would indeed be rash; those most directly concerned in marketing methods, the producers themselves, may be taken to agree with the report submitted by the Executive Committee of a Conference of Producers and Consumers which was held at Bathurst in September 1926, under the presidency of the then Minister for Lands in the Government of New South Wales. That report states:

> The various Committees indicate generally by their reports that they favour the principle of collective marketing and distribution. In order to make this principle effective, it is recognized that producers must have the opportunity of indicating by a ballot that the handling of their particular product should be controlled by a board on which producers should have direct majority representation with reasonable representation to consumers. A general desire has also been expressed for closer co-operation between producers' and consumers' organizations for the purpose of improving marketing facilities and the exploiting of markets abroad.

It is the hope of all that these counsels of perfection may bear good fruit for producers and consumers alike.

INTERVAL BETWEEN ELECTION AND MEETING OF PARLIAMENTS.

[*Contributed by* CARL L. W. MEYER, ESQ.]

AT certain intervals, following the election of legislators in the United States to Congress, this country is confronted by what is generally referred to in America as a "Lame duck session." This singular state of affairs which has been the object of frequent attacks in Congress and which will presently be explained a little more fully is due of course to the provision in the United States Constitution [1] which declares that—

> Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day;

and to a statutory enactment [2] which provides that—

> The Tuesday after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of the said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

Members of Congress, elected at the beginning of November, are thus prevented from taking their seats during the session which begins about a month after their election and lasts, as a rule, until March 4, the date when the new Congress starts; in other words, thirteen entire months will ordinarily elapse (unless a special session is called) before the newly elected Members can take their seats. As a result of this we have in every election year, as has been noted above, a "Lame duck session," which means that for four full months a number of Members of Congress

[1] Constitution of the United States, art. 1, sec. 4. During the 39th Congress a law was passed which provided that "in addition to the present regular times of meeting of Congress, there shall be a meeting of the Fortieth Congress of the United States, and of each succeeding Congress thereafter, at twelve o'clock meridian, on the fourth day of March, the day on which the term begins for which the Congress is elected, except that when the fourth of March comes on Sunday, then the meeting shall take place at the same hour on the next succeeding day." This provision, however, was soon afterwards repealed. See 14 *U.S. Stats. at Large*, p. 378, c. 10.

[2] *U.S. Rev. Stats.*, 2nd ed., Washington, Govt. Print. Off., 1878, p. 5, sec. 25.

continue to make and frame laws even though the result at the polls has clearly shown that they no longer enjoy the confidence of the voters.

An attempt is made in the present inquiry to give briefly a statement as to the constitution of other parliaments and to show what is the law and custom of other countries in regard to the election and the terms of their legislative bodies ; and especially to show as to how long a period of time their laws permit to intervene between the election and the seating of legislators following such election.

Argentina.[1]—In the Argentine Republic both Houses of Congress are required by the Constitution to meet annually in regular session from May 1 to September 30.[2] The law of 1912,[3] concerning the Argentine elections, provides that the elections of Deputies shall take place throughout the country on the first Sunday in March of all years of even number.[4] Moreover, the law provides that, for the ordinary renovation of the national Senate, the legislative Chambers of the provinces shall meet and name Senators by plurality of votes before March 1 of the year of renovation.[5] The time elapsing, therefore, between the election and the assembling of the legislative bodies amounts to about two months.

Australia.—The Parliament of the Commonwealth of Australia consists of the King, represented by the Governor-General, a Senate and a House of Representatives.

The Senate,[6] one-half of which is renewed every three years, is elected

[1] In Argentina the legislative power is vested in a Congress of two Houses, the "House of Deputies of the Nation," and the "House of Senators of the Provinces and of the Capital." The Members of the House of Deputies are elected directly and by simple plurality of votes by the people of the provinces and of the capital. They are chosen for a term of four years, but one-half of the House is renewed every two years ; while the members of the Senate are elected for nine years, with renewal of one-third of the Senate every three years. See Constitución de la Nación Argentina (bearing the date of May 1, 1853, as amended in 1860, 1866, 1868 and 1898) in *Collección completa de leyes nacionales*, vol. 1, pp. 27 ff., arts. 36, 37, 42, and 47. The Senate comprises thirty Members, two from the capital and two from each of the fourteen provinces. Senators are elected by the legislatures in the provinces, and by a special body of electors in the federal capital. The House of Deputies at the present time is composed of 158 Representatives. According to the Constitution there is one Deputy for every 33,000 inhabitants. (See amendment of March 15, 1898, in *Collección completa*, vol. 1, p. 48.)

[2] Constitución, art. 55.

[3] Ley electoral (no. 8871) in *Collección completa*, vol. 17, p. 555, art. 11, as amended by Ley núm. 10269 (reformando los articulos 11 y 61 de la ley de elecciones nacionales) in *Collección completa*, vol. 19, p. 581.

[4] *Ibid.*

[5] Ley núm. 8871, art. 13 ; *Collección completa*, vol. 17, p. 555. Extraordinary elections for vacancies must be held during the ordinary periods on the holiday to be designated by law.

[6] The Upper Chamber is composed of Senators for each State directly chosen by the people of the State. In 1926 the Senate consisted of 36 Members. The Constitution provides for 6 Senators for each Original State. Parliament may make laws increasing or diminishing the number of Senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than 6 Senators. (See Constitution Act, c. i, pt. 2, secs. 1–23.)

for a term of six years. However, in case of prolonged disagreement with the House of Representatives, it may be dissolved, and an entirely new Senate elected.

The House of Representatives,[1] which is composed of Members directly chosen by the people of the Commonwealth, continues for three years from the date of its first meeting, unless it is dissolved before the expiration of that time by the Governor-General. Under the Constitution the Governor-General in Council is authorized to issue writs for general elections of Members of the House of Representatives. The Constitution provides that after the first general election the writs must be issued within ten days from the date of the expiry of a House of Representatives or from the date of the proclamation of its dissolution.[2]

It is provided by the Commonwealth of Australia Constitution Act [3] that the Australian Parliament after any general election must be summoned to meet not later than thirty days after the day fixed for the return of the writs of election. The Governor-General is authorized by this Act to appoint such time for holding the sessions of the Parliament as he thinks fit ; and he may, from time to time, by proclamation or otherwise, prorogue the Parliament, and in a like manner dissolve the House of Representatives.[4] However, there must be a session of Parliament at least once every year, so that " twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting of the next session." [5]

Austria.[6]—The Austrian Nationalrat, which is elected in accordance with the principle of proportional representation by the equal, direct, secret and personal suffrage of all Austrian men and women having reached the age of twenty years before January 1 of the year of election, is chosen for a term of four years. The legislative period of this Chamber begins with the day of its first meeting and shall last " in any case " until the day when the new Nationalrat is summoned.[7] Art. 27, sec. 2, of the Austrian Constitution stipulates that the Nationalrat must be summoned by the President of the Austrian Republic to meet within thirty days after its election, and that the election is to be arranged by the Federal Ministry in such a manner that the newly elected Nationalrat can meet

[1] See Constitution, Act, c. i, pt. 3, secs. 24–40. The Lower House consists, as nearly as may be, of twice as many Members as there are Senators. In 1924 it had 76 Members.

[2] *Ibid.*, sec. 32.

[3] As amended to 1927. Australia, Commonwealth Acts, 63 & 64 Vict., c. 12, and subsequent amendments.

[4] Constitution Act, c. i, pt. 1, sec. 5.

[5] *Ibid.*, sec. 6.

[6] The Austrian Parliament, in accordance with the provisions of the new Constitution adopted on October 1, 1920, consists of a Nationalrat (national council) and a Bundesrat (federal council).

[7] See Austrian Constitution, arts. 26–7. The Austrian Constitution was first published in the *Staatsgesetzblatt für die Republik Oesterreich* (Austrian Official Gazette), Jahrgang 1920, Ausgegeben am 5. Oktober 1920, Stueck 140, pp. 1791 ff.; it was republished in 1925 in the *Bundesgesetzblatt für die Republik Oesterreich*, Ausgegeben am 30. September 1925, Stueck 80, pp. 1393 ff.

on the day following the expiry of the old body. The Nationalrat may be adjourned by its own resolution only, and its reassembly is ordered by its President. The latter must convoke the Nationalrat immediately if at least one-fourth of its Members or the Federal Ministry (*Bundesregierung*) demand it.[1] The Nationalrat may, by an ordinary law, decree its dissolution. Also in this case the legislative period shall last until the newly elected Nationalrat meets.[2]

The members of the Upper House, or Bundesrat,[3] are elected by the Diets of the several Austrian States[4] for the duration of their terms. After the expiration of the term of a State Diet, or after its dissolution, the Members of the Bundesrat elected by it continue to exercise their functions until the election of Members for the Bundesrat by the new State Diet has taken place.[5] The presidency of the Bundesrat is held alternately by the States in alphabetical order for a period of six months. The Bundesrat is convoked by its presiding officer at the seat of the Nationalrat. Upon the request of the Federal Ministry or of not less than one-fourth of the Members of the Bundesrat the presiding officer (*Vorsitzende*) must summon this Chamber without delay.[6]

Brazil.[7]—The Brazilian Chamber of Deputies[8] is elected for three years by direct vote of the people, in a proportion not greater than one for every 70,000 inhabitants.[9] Elections of Members for the Chamber of Deputies are held, simultaneously with those for the partial renewal of the Senate, on the first Sunday in February preceding the first session of the new legislature. However, if the elections happen to fall in the same year with the elections for President and Vice-President[10] they are to be held at the same time with the latter, that is, on the first of March.[11]

The Senate, which is composed of sixty-three Members,[12] is elected

[1] Constitution, art. 28.

[2] *Ibid.*, art. 29.

[3] The Bundesrat, or Federal Council, represents the Austrian States (Laender) in proportion to the number of citizens in each State; but no State may have more than twelve nor less than three Members in the Bundesrat.

[4] At present the Austrian Republic is composed of the following States: Vienna, Burgenland, Lower Austria, Salzburg, Styria, Tyrol and Vorarlberg. The City of Vienna and the State of Lower Austria are to be regarded as separate States in regard to representation and status in the Bundesrat (see Const., art. 34).

[5] *Ibid.*, art. 35, sec. 3.

[6] *Ibid.*, art. 36.

[7] The National Congress of the Republic of Brazil is composed of two branches, the Chamber of Deputies and the Senate (see "Constituição da Republica dos Estados Unidos do Brazil," published in *O Direito, revista mensal de legislação, doutrina e jurisprudencia*, vol. 54 (1891), p. 332, art. 16).

[8] At the present time has 212 Members.

[9] But each State as well as the Federal District shall be entitled to at least four Representatives, irrespective of population (*ibid.*, art. 28). In 1926 the Federal District had 10 Representatives in the Chamber of Deputies.

[10] This occurred in 1918, and will occur again at intervals of twelve years.

[11] See decreto no. 3424, publ. in *Diario Official* (Official Gazette of Brazil), Dec. 22, 1917, p. 13645, art. 1.

[12] Article 30 of the Constitution provides that there shall be three Senators for each State and three for the Federal District, elected in the same manner as the Deputies.

for nine years by direct vote, and is renewed to the extent of one-third every three years. Senators elected to fill vacancies continue during the remainder of the term of the Senator replaced.[1]

The Constitution, bearing the date of February 24, 1891, provides that Congress shall assemble in the federal capital annually on the third day of May, without being summoned, unless another day is designated by law. Congress must continue in session for four months from the date of the opening, and may be prorogued, adjourned or summoned to meet in extraordinary session.[2] Congress alone, however, has the right to prorogue or adjourn its sessions. Each legislature continues for three years. In the case of vacancies in Congress, due to resignation or to any other causes, the respective State must immediately order the election of a new Member.[3]

Canada.[4]—The Canadian Senate comprises ninety-six Senators,[5] who are not elected by the people but are nominated for life by summons of the Governor-General under the Great Seal of Canada.[6]

The House of Commons is elected by the people for a term of five years, but it may be sooner dissolved by the Governor-General.[7]

The Act of 1867[8] provides that there shall be a session of Parliament at least once every year, so that "twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session." In the absence of any laws to that effect there is, of course, no definite interval in Canada between elections and the meeting of Parliament. Both the length of life of Parliament[9] (with the maximum limit of five years) and the fixing of the date for the elections (which must be fixed so that not more than twelve months elapse between two sessions of Parliament) rest with the Governor-General. The interval between elections and the convening of Parliament

[1] Constitution, art. 31. [2] *Ibid.*, art. 17. [3] *Ibid.*

[4] The Canadian Parliament, in accordance with the British North America Act, 1867, which came into force on July 1, 1867, consists of the Sovereign, the Senate and the House of Commons (see 30 & 31 Vict., c. 3, sec. 17).

[5] See British North America Act, 1867, as amended by the British North America Act, 1915, 5 & 6 Geo. V, c. 45, sec. 1, subsec. 2. The Senate is composed of 24 Senators from Ontario, 24 from Quebec, 10 from Nova Scotia, 10 from New Brunswick, 4 from Prince Edward Island, 6 from Manitoba, 6 from British Columbia, 6 from Saskatchewan and 6 from Alberta.

[6] Act of 1867, sec. 24.

[7] *Ibid.*, sec. 50. The average life of the Parliament has been a little under four years.

[8] Brit. North Am. Act, 1867, sec. 20. The British North America Act, 1867, fixed the number of Representatives at 181; however, the Representation Act, 1924, raised the number to 245 (see An Act to readjust the representation of the House of Commons, 14 & 15 Geo. V, c. 63). The 245 Members are distributed among the different Provinces as follows: Ontario 82, Quebec 65, Nova Scotia, 14, New Brunswick 11, Manitoba 17, British Columbia 14, Prince Edward Island 4, Saskatchewan 21, Alberta 16, and Yukon Territory 1.

[9] Although the Governor-General is authorized to dissolve the House of Commons at any time, he must have or obtain a Ministry to take the responsibility for his act.

has generally been short for reasons similar to those prevailing in the case of Great Britain.[1]

France.[2]—The French Senate consists of 314 Members, who are elected for nine years from French citizens not less than forty-one years old. One-third of the Senate is renewed every three years.[3]

The Chamber of Deputies[4] is chosen for four years, and is renewed integrally.

Art. 1 of the constitutional law of July 16, 1875, concerning the relation of the public powers, provides that the Senate and the Chamber of Deputies must assemble each year on the second Tuesday of January unless a previous summons is issued by the President of the Republic. The two Chambers must remain in session at least five months each year. Art. 2 of the same law decrees that the President of the Republic is to pronounce the closing of the session; that he shall have the right to convoke the Chambers in extraordinary session; and that he *must* convoke them during the recess if this is requested by an absolute majority of the Members composing each Chamber. The law also authorizes the President to adjourn the Chambers; but such adjournment must not extend the term of one month, nor may it take place more than twice during the same session. Moreover, the President has the right,[5] with the advice of the Senate, to dissolve the Chamber of Deputies before the legal expiration of its term. In this case the electoral college must be summoned for new elections within the space of two months, and the Chamber within ten days following the close of the elections.[6]

The date of the election is determined by presidential decree, but it must fall within sixty days preceding the expiry of the four years for which the Chamber was elected.[7] In case of a vacancy caused by death, resignation, etc., an election must take place within the space of three months beginning with the day on which the vacancy

[1] See below.

[2] The French National Assembly is composed of a Senate and a Chamber of Deputies.

[3] See Loi du 9 décembre 1884, portant modification aux lois organiques sur l'organization du Sénat et les élections des sénateurs, in *Code Civil*, annoté par M. Henry Bourdeaux, Paris, 1926, pp. xxix–xxxi, arts. 1, 4 and 7.

[4] The Members of the Chamber of Deputies are elected by "scrutin de liste" by departments (see Loi organique du 30 novembre 1875, sur l'élection des députés; see also Loi du juillet 1919, portant modification aux lois organiques sur l'élection des députés et établissant le scrutin de liste avec représentation proportionnelle; in *Code Civil*, 1926, pp. xxiii–xxviii; see especially arts. 1, 2, 5, 6, 7 and 15, and pp. xxxix–xli, arts. 1, 3, 16 and 17). Deputies, who must be French citizens and at least twenty-five years old, are elected by manhood suffrage and by secret ballot of all male citizens twenty-one or more years old, not actually in military service.

[5] See Loi du 25 février, relative à l'organization des pouvoirs publics, art. 5; *Code Civil, op. cit.*, p. xiv.

[6] As amended by art. 1 of the constitutional law of Aug. 14, 1884.

[7] Subject to the case of a dissolution provided for and regulated by law; see Loi du 16 juin 1885, ayant pour objet de modifier la loi électorale, art. 6.

occurred. Vacancies occurring during the six months preceding the renewal, that is, the next general election of the Chamber, are not to be filled.[1]

Germany.—The new German Constitution of August 11, 1919, provides for a Reichstag composed of Deputies representing the German people, and for the establishment of a Reichsrat, or Federal Council, formed for the representation of the German States in federal legislation and administration.

The Reichstag,[2] which is elected for a term of four years, must assemble annually on the first Wednesday of November at the seat of the Federal Government. The President of the Reichstag is bound to summon the legislature at a time prior to this date if the President of the Republic or at least one-third of the Members of the Reichstag request it. Art. 23 of the German Constitution stipulates that the Reichstag must assemble for its first meeting not later than thirty days after election ; and a new election must be held not later than sixty days after the expiration of its four-year term. The Reichstag itself determines the date of the close of its session and the date of its reassembly. The President of the Republic (*Reichspraesident*) is authorized under the Constitution to dissolve the Reichstag ; but he can do this only once for the same cause. If he dissolves the Reichstag a new election must take place not later than sixty days after the dissolution.[3]

The Reichsrat, or Federal Council,[4] representing the will of the States as such rather than the will of the individual citizen, is made up of Ministerial Delegates from all the German States and from the free Hanseatic City-States of Hamburg, Luebeck and Bremen. The Federal Ministry convokes the Reichsrat, and it must do so upon the request of two-thirds of the members of the Reichsrat.[5]

[1] Loi du 12 juillet 1919 (cited above), arts. 16 and 17 (see also Esmein, *Éléments de Droit Constitutionnel Français et Comparé*, Paris, Librairie de la Société du Recueil Sirey ; and Rabany, Charles, *Guide Général des Elections*, 3rd ed., Paris, 1925.

[2] The Reichstag consists of 493 Representatives, elected by universal, equal, direct and secret suffrage of all men and women above the age of twenty, upon the principle of proportional representation (see German Constitution, arts. 22–3).

[3] See " Die Verfassung des Deutschen Reichs, vom 11. August 1919 " ; published in the *Reichsgesetzblatt* (German off. gazette), No. 152 (1919), pp. 1388–91, arts. 20–40. The present Reichstag was elected on Dec. 7, 1924. For " Bekanntmachung der neuen Fassung des Reichswahlgesetzes and des Gesetzes über die Wahl des Reichspräsidenten, vom 6. Maerz 1924," see *Reichsgesetzblatt*, Teil 1, No. 18 (1924), pp. 159 ff.

[4] See *Reichsgesetzblatt*, No. 152 (1919), pp. 1394–5, arts. 60–7. Each State has at least one vote in the Reichsrat. The larger States have one vote for each million of inhabitants. No State, however, may have a representation of more than two-fifths of the total number of the Members of the Reichsrat.

[5] In 1926 the Reichsrat consisted of 68 Members. Of these Prussia had 27, Bavaria 11, Saxony 7, Wuerttemberg 4, Baden 3, and the other States a total of 16 Members.

Great Britain.[1]—There is no fixed rule in Great Britain requiring the lapse of a certain length of time between the election of Members and the summoning of Parliament. While under the American system of government elections fall at stated periods, regardless of the condition of public affairs, the national elections in England do not. The only positive requirement as to the national elections in that country is that an election must be ordered when Parliament has attained the maximum lifetime allowed by law, which by the Parliament Act, 1911,[2] was limited to five years. Furthermore, the duration of the annual sessions of Parliament varies. Before the world war the annual sessions used to last from the middle of February to about the middle of August, or sometimes a little longer. However, since 1914 the sittings of Parliament have been interrupted by comparatively short intervals.

Parliamentary sessions in Great Britain end with the prorogation by the Sovereign.[3] Parliament may be dissolved by the will of the Sovereign, or, during the recess, by proclamation, as is usually the case, or by lapse of time, that is, at the expiration of the statutory limit of five years. On the other hand, Parliament has the power to prolong its own life. This power Parliament has exercised during the war years 1914–18. In the absence of any law requiring the holding of elections at a definite time, elections have taken place in Great Britain at irregular intervals. There were, for instance, two elections in 1910, and one election during each of the years of 1922, 1923 and 1924. Parliament is summoned by the writ of the Sovereign issued out of Chancery, by advice of the Privy Council, not less than twenty days prior to its meeting.

The practice in Great Britain in the past has been to make the interval between the elections and the summoning of Parliament as short as possible. This practice is due to the fact that the Ministry, who constitute the administrative branch of the Government, must at all times possess the confidence and support of a majority in the House of Commons. In order to determine whether or not the Ministry possesses this support it is necessary to call the House into session. Any Ministry

[1] The Parliament of Great Britain is divided into two Houses of Legislature, the Lords and the Commons. The House of Lords is composed of Peers who hold their seats (*a*) by hereditary right, (*b*) by creation of the Sovereign, (*c*) by virtue of office, (*d*) by election for life and (*e*) by election for the duration of Parliament. The total number of the Members of the House of Lords at the present time exceeds 700. The House of Commons is made up of Members representing County, Borough and University constituencies. Under the Representation of the People Act, 1918, male electors must be at least twenty-one years of age, and have resided, or occupied business premises of an annual value of not less than ten pounds, in the same parliamentary borough or county, or one contiguous thereto, for six months ending on January 15 or July 15. By the Representation of the People (Equal Franchise) Act, 18 & 19 Geo. V, c. 12, women were given the vote equally with men both in respect of parliamentary and local government elections. The total membership of the House of Commons since 1922 is 615.

[2] 1 & 2 Geo. V. c. 13, sec. 7.

[3] All Bills which have not been passed during the session lapse with the prorogation of Parliament.

continuing in power after a general election without summoning Parliament would be doing so without a mandate from the British people. It is impossible, of course, under the British system of government that a condition could arise which would make it possible for Members of Parliament to continue to legislate for months after the people have had an opportunity to register the fact at the polls that such Members no longer represent the views of the voters.[1]

Hungary.—In January and February, 1920, Hungary elected a new Parliament,[2] which decided that the period of the revolutions of 1918 and 1919 should be treated *de jure* as a blank space of time, and that the old monarchical Constitution was to be continued.

The "Law concerning the annual sessions of the Diet"[3] provides that a new election of Representatives must be held throughout the country at the expiration of every fifth year within six weeks prior to the opening of the first annual session of the new Diet. Members who are elected during the interval between the general elections shall retain their seats in the next Diet only by means of a new election. This law authorizes the Crown to extend or adjourn the assembled annual session and also to dissolve the Diet before the expiration of its five-year term and, in the latter event, to order a new election of Representatives. In this case, however, the new Diet must be summoned to meet within three months after the dissolution of the former Diet.[4] Representatives are elected for five years, and for all the annual sessions of the Diet.[5]

Italy.[6]—The Fundamental Statute of March 4, 1848, which with some modifications is in force at the present time, provides that the sessions of the Senate and of the Chamber of Deputies shall begin and end at the same time, and that any meeting of one Chamber at a time when the other is not in session is illegal and its acts are void.[7]

Parliament, the life of which is five years, is convoked annually by the King. The latter is authorized to prorogue the sessions and to

[1] For further references see Anson, *The Law and Customs of the Constitution*, Oxford, 1922, cc. 3–4; Lowell, *The Government of England*, New York, 1912–14, vol. 1, cc. 9–16; Macy and Gannaway, *Comparative Free Government*, New York, 1915, c. 35; Munroe, *The Governments of Europe*, New York, 1920, c. 8; Ogg and Beard, *National Governments and the World War*, New York, 1919, cc. 12–14.

[2] Elected on the basis of universal suffrage.

[3] Gesetzartikel 4 vom Jahre 1847–8, über die jaehrliche Session des Reichstages, as amended by Gesetzartikel 1 vom Jahre 1886, über die Verlaengerung der Dauer des Reichstages; see Ungarn, *Landesgesetz-Sammlung für das Jahr* 1886, p. 1.

[4] Gesetzartikel 4 vom Jahre 1847–8, secs. 4 and 5 as amended in 1886.

[5] *Ibid.*, sec. 3; see also Marczali, H., *Ungarisches Verfassungsrecht*, pp. 84 ff.

[6] The Italian Parliament consists of two Chambers, a Senate and a Chamber of Deputies. The Senate is composed of the Princes of the Royal Family and of Members, unlimited in number, having attained the age of forty, who are appointed for life. The Deputies, who are elected for five years, must not be less than twenty-five years old, and must comply with the other qualifications required by the electoral law. (See "Statuto Fondamentale del 4 di marzo," in *Collezione celerifera delle leggi*, Torino, 1848, pt. 1, pp. 138 ff., arts. 3, 33, 34 and 40.)

[7] Statuto Fondamentale, art. 8.

dissolve the Chamber of Deputies at any time he sees fit to do so. If the King dissolves the Parliament he must order new elections and convoke a new meeting within the space of four months.[1] The last elections before the war were held in October 1913. Since then elections have been held in November 1919, May 1921, and April 1924, which goes to show that since the war dissolution of Parliament has been the rule.

Latvia.[2]—The Latvian Saeima is elected for a period of three years. However, the President of the Republic has the right to propose its dissolution. Such proposal is to be followed by a referendum. If in the referendum more than one-half of the votes are cast in favour of dissolution the Saeima is considered as dissolved, and new elections must be held within two months of the dissolution of the Parliament.[3]

The general parliamentary elections, according to the provisions of the Constitution, are to take place every third year on the first Sunday in October and on the preceding Saturday. The newly elected Saeima must hold its first meeting on the first Tuesday in November, the powers of the previous Parliament expiring on that day. If the parliamentary elections, on account of the dissolutions of the previous Saeima, take place at another time of the year the Saeima thus elected must assemble not later than one month after its election, and its powers expire after two years, on the first Tuesday in November, on which day a new Saeima is to assemble.[4]

Netherlands.—According to the Dutch Fundamental Law[5] the

[1] See Statuto Fondamentale, arts. 9 and 42.

[2] The new Constitution of the Latvian Republic which was passed by the constituent assembly on February 15, 1922, makes provision for a Parliament (Saeima) consisting of 100 Representatives of the people. The Members of the Saeima are elected by universal, direct and secret vote, on the basis of proportional representation. Latvian citizens of both sexes who are over twenty-one years old and in possession of their civil rights are entitled to vote (Constitution, arts. 6 and 8). For an English translation of the Constitution see *Brit. & For. State Papers*, London, 1925, vol. 116, pp. 794–802.

[3] See Constitution, arts. 10 and 48.

[4] *Ibid.*, arts. 11–13. Each Saeima is to elect its Board, consisting of a President, his two deputies, and secretaries. A newly elected Saeima must be opened by the President of the preceding Saeima or by any other Member of the Board charged by the Board. See *ibid.*, arts. 16 and 17.

[5] Grondwet voor het Koninkrijk der Nederlanden, arts. 1 ff. For full text of the Constitution as amended up to Dec. 27, 1922, see *Staatsblad van het Koninkrijk der Nederlanden*, 1922, No. 736. For an English translation see *Brit. & For. St. P.*, London, 1925, vol. 116, pp. 863–94. The First Chamber comprises fifty Members who are elected by the Members of the provincial States and Diets on the basis of proportional representation. Members of the First Chamber are chosen for six years, one-half of their number retiring every three years. The retiring Members may be immediately re-elected. (Grondwet, arts. 83 and 92.) The Second Chamber consists of 100 Members chosen directly by Dutch subjects having reached the age of twenty-five years. They are elected for four years and, like the Members of the First Chamber, on the basis of proportional representation. Members of the Second Chamber retire in a body, and may be re-elected immediately. (See Grondwet, arts. 81–83, and 86.)

Netherlands form a constitutional and hereditary monarchy, the legislative power being vested conjointly in the Sovereign and Parliament. Parliament, or the "States General," consists of two Chambers, the upper, or "First Chamber," and the lower, or "Second Chamber."

Under the Constitution the Sovereign is authorized to dissolve both Chambers of Parliament. He may dissolve each one separately or both at the same time. If he does so, the decree pronouncing the dissolution must simultaneously order new elections to take place within forty days and convoke the new meeting within three months.[1] The duration of the session of Chambers elected after the dissolution may be determined by law. The Netherlands Parliament must assemble at least once every twelve months. The Constitution stipulates that ordinary sessions shall be opened on the third Tuesday in September. Extraordinary sessions may be called by the Sovereign as often as he deems necessary. Ordinary annual sessions must last at least twenty days, unless the Sovereign avails himself of his right to dissolve Parliament before the expiration of that period of time.[2]

New Zealand.—The Parliament of New Zealand, officially known as the "General Assembly," consists of two Chambers, a Legislative Council and a House of Representatives. The Legislative Council, which in 1926 comprised 38 Members, is appointed by the Governor-General.[3] Members of the Council are appointed for a period of seven years, but may be reappointed.[4] The House of Representatives, consisting of 80 Members, is elected by the people for the term of three years. S. 13 of the Legislature Act, 1908,[5] provides that "every such House of Representatives shall, unless the General Assembly is sooner dissolved, continue for a period of three years, computed from the date fixed for the return of the writs issued for choosing such House, and no longer."

According to the provisions of the same Act the Governor-General shall "from time to time, as occasion requires"[6] summon the House of Representatives. The first Parliament met in 1854. Since 1860 Parliament has been in session every year.[7] Under the New Zealand Constitution the Governor-General has the power to summon, prorogue

[1] See Grondwet, art. 73.

[2] *Ibid.*, arts. 73, 101 and 104. See *New Zealand, Official Year-Book*, 1926, p. 65.

[3] Up to 1891 Members of the Council were appointed for life. Provisions for an elective Legislative Council was made by the Legislative Council Act, 1914, which was originally intended to come into operation at the first general election of Members of the House of Representatives in 1915. But the establishment of the new system has been postponed from time to time, and the position at present is that the Act shall be put into operation at a date to be fixed by proclamation of the Governor-General. See *Off. Year-Book*, 1926, p. 55.

[4] Act No. 101 of 1908, as amended by subsequent Acts. By an Act to grant a Representative Constitution to the Colony of New Zealand (15 & 16 Vict., c. 72), provision was made for quinquennial Parliaments; the latter were abolished by the Triennial Parliaments Act, 1879, which fixed the term at three years.

[5] Act No. 101 of 1908, sec. 13, subsec. 1.

[6] For a list of successive Parliaments since 1854 see *Off. Year-Book*, p. 63.

and dissolve the Parliament. It is provided, however, that the Governor-General must for every general election direct the Clerk of the Writs to proceed with the elections not later than seven days after the day of the dissolution or expiry of the last Parliament.[1]

Norway.—The Norwegian Storthing[2] is composed of two Chambers, the Lagthing (First Chamber) and the Odelsthing (Second Chamber). Art. 68 of the Constitution provides that, as a rule, the Storthing shall assemble every year[3] on the first weekday after the tenth of January at the capital of the Kingdom, unless the King, because of extraordinary circumstances, such as hostile invasion or contagious disease, designates another city of the realm for the purpose. In extraordinary cases the King has also the right to convene the Storthing at another than the usual time, and he may close such extraordinary session whenever he thinks proper.[4] The ordinary sessions, however, are closed at the discretion of the Storthing; and the meetings take place *suo jure*, and not by writ of the Crown.[5] Representatives of the Storthing are chosen every third year. Article 54 of the Grundlov provides that the elections must be concluded before the end of the month of November.[6]

Poland.—The President of the Polish Republic is authorized by the Constitution[7] to convoke, open, adjourn and close the

[1] Act. No. 101 of 1908, sec. 98.

[2] Norway's Constitution, or "Grundlov," of May 17, 1814, as modified by subsequent amendments, vests the legislative power of the Kingdom in the Storthing, which is elected by Norwegian men and women who have attained the age of twenty-three years, who are citizens of Norway, and reside there and have resided there for five years (Grundlov, arts. 50–53). The Grundlov provides for the election of 150 Representatives for the Storthing. Of this total number the Storthing at its first regular session selects one-fourth (as nearly as this can be done) to constitute the Lagthing. The remaining three-fourths then form the Odelsthing. Each House holds its meetings separately and elects its own President and Secretary. Neither of the two Houses hold meetings unless two-thirds of the Members are present. All new Bills must first be presented to the Odelsthing, from which they are sent to the Lagthing for approval or rejection. In the case where the Odelsthing and the Lagthing are unable to agree on a measure, they both assemble in a common sitting to deliberate, and the Bill is then acted upon by a two-thirds vote. Bills passed by the Odelsthing and approved by the Lagthing or by the united Storthing are then sent to the King for approval. (Grundlov, arts. 49, 57, 73, 76 and 77.) For text of Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17 Mai, 1814, and subsequent amendments, see *Norges Statskalender for Aret*, 1925, p. 1506.

[3] The original text of the Grundlov stipulated that the Storthing was to meet every third year in February. The date has been changed several times since then. See A. Aall and N. Gjelsvik, *Die norwegisch-schwedische Union, ihr Bestehen und ihre Loesung*, Breslau, 1912, p. 361, note 1.

[4] See Grundlov, art. 54.

[5] *Ibid.*

[6] Prior to the amendment of June 8, 1907, elections had to be concluded before the end of the month of September.

[7] For an English translation of the Polish Constitution see McBrain and Rogers, *The New Constitutions of Europe*, New York, 1922, pp. 405–25; this is a reprint of the translations which appeared in *Current History*, May issue, 1921.

Sejm [1] and the Senate. The Sejm must be summoned to meet on the third Tuesday after election day, at the latest in October. There must be at least one ordinary session annually, for the purpose of voting the budget, the numerical strength and recruiting of the army, and other current affairs.[2] The President of the Republic may convoke the Sejm to an extraordinary session whenever he thinks it necessary to do so ; however, he must do this within the space of two weeks upon the request of one-third of the total number of Deputies.[3] The Sejm may be adjourned once during an ordinary session, but the adjournment must not exceed thirty days. The consent of the Sejm is necessary for a second adjournment during the same session or if the interruption is to last for more than thirty days.[4] In either case the Senate is dissolved at the same time.[5] Elections must take place within forty days from the date of the dissolution.[6] The terms of both Houses begin at the same time.[7]

Russia.—The present governmental system differs essentially from that of other nations.[8] On July 10, 1918, the All-Russian Congress of Soviets adopted the Constitution of the new State,[9] the territorial limits of which have undergone considerable changes. The new State, which was termed the Russian Socialist Federal Soviet Republic (R.S.F.S.R.), comprises about seven-eighths of the territory of the former Russian Empire,[10] and is composed of the provinces of Russia proper, a number

[1] The Polish Constitution of March 17, 1921, provides for a Parliament consisting of two Chambers, a Senate and a House of Representatives (Sejm). The Senate at the present time is composed of 111 Members elected by universal, secret, direct, equal and proportional voting. The Sejm, which comprises 444 Representatives, is also elected by general suffrage on the system of proportional representation.

[2] Constitution of March 17, 1921, art. 25. The Sejm, when summoned in October for its ordinary session, may not be closed before the budget has been voted.

[3] Constitution, art. 25.

[4] *Ibid.*

[5] *Ibid.*, art. 26.

[6] The precise date of the dissolution is determined by the resolution of the Sejm or in the message of the President concerning the dissolution. See art. 26.

[7] Constitution, art. 36.

[8] As a result of the revolution which broke out at the beginning of March 1917 the Emperor Nicholas II abdicated, and a provisional government under Prince Lvoff was set up by the Duma, the Parliament existing at that time. The Lvoff Government was followed by the Kerensky Government, which remained in power until November 7, 1917, when the Military Revolutionary Committee of the Petrograd Soviet took control of the government, and on the day following transferred it to the All-Russian Congress of Soviets.

[9] The Constitution of July 10, 1918, was subsequently modified during the years 1919–23. On May 11, 1925, the Constitution was further amended in order to bring it into line with the Constitution of the Union of Socialist Soviet Republics. See below.

[10] After the dissolution of the Empire new States evolved from the old, and thus considerable territory was transferred to Poland, Finland, Esthonia, Latvia, Lithuania, Turkey and Roumania. Moreover, the Ukrainian, the Transcaucasian, and the White Russian Socialist Soviet Republics were established without interference from the largest of the succession States, the R.S.F.S.R. In fact, the latter has brought about a federation with the former three Republics which is known

of autonomous Republics [1] and various autonomous regions and areas.[2]

The supreme authority of the R.S.F.S.R., the All-Russian Congress of Soviets,[3] must be summoned to meet not less than twice a year by the All-Russian Central Executive Committee of Soviets.[4] A special session of the Congress may be called by the said Committee either upon its own initiative or at the request of local soviets representing in the aggregate not less than one-third of the total population of the Republic.[5] In the interval between the sessions of Congresses, the All-Russian Central Executive Committee is the supreme authority of the Republic.[6] There is no fixed date as to when the Congresses must be summoned, and in the past meetings were held at irregular intervals. Elections were held before the convening of each Congress.[7]

The Union of Soviet Socialist Republics (U.S.S.R.) which at the present time is composed of the six Republics named above,[8] adopted a Constitution on July 6, 1923, and confirmed it on January 31, 1924.[9]

as the Union of Socialist Soviet Republics, and is generally referred to as the U.S.S.R. This Union was joined in September 1924 by the Uzbek S.S.R. and the Turcoman S.S.R. On December 30, 1922, delegates from the four principal Republics concluded at Moscow a treaty establishing a Union of Socialist Soviet Republics (U.S.S.R.), comprising Russia proper and united territories (R.S.F.S.R.), Ukraine (Ukr.S.S.R.), White Russia (W.R.S.S.R.), and the Transcaucasian Federation (T.S.F.S.R.). This Treaty of Union is embodied in the Constitution of the U.S.S.R. An English translation of this Constitution may be found in the *Commercial Year-Book of the Soviet Union*, London, 1925, pp. 1 ff. Another translation is contained in the *Soviet Union Year-Book*, London, 1926, pp. 1 ff.

[1] Kirghiz, Tartar, Bashkir, Daghestan, Yakutsk, Crimea, Mongol-Buryat, Karelia, and German Volga.

[2] Adighejevsko-Cherkess, Votsk, Ingush, Kabardin, Kara-Kirghiz, Kara-Kalpak, Kalmuk, Karachaevo-Cherkess, Ziriansk (Komi), Marisk, Oiratsk, Northern Ossetia, Cherchensk and Chuvash.

[3] Constitution of July 10, 1918, c. 6, art. 24. For an English translation of the Constitution of the R.S.F.S.R. of July 10, 1918, see Rothstein, Andrew, *The Soviet Constitution*, London, 1923, pp. 11 ff. For another translation see *The New York Nation*, January 4, 1919, p. 8. The All-Russian Congress of Soviets consists of Representatives of urban soviets, elected on the basis of one deputy for every 25,000 electors, and of Representatives of the provincial congresses of soviets, on the basis of one Deputy for every 125,000 inhabitants; see Constitution, c. 6, art. 25.

[4] This Committee is elected by the All-Russian Congress of Soviets.

[5] Constitution, arts. 26–7.

[6] *Ibid.*, art. 30.

[7] See Rothstein, *The Soviet Constitution*, p. 102.

[8] Four Republics founded the Union. See note, p. 286.

[9] The scope of authority of the Union Government, as defined by the Constitution, is extensive; but one of the principal matters within the competence of the Union, as exercised through the supreme governing departments, is the representation of the Union in international affairs, including the conduct of all diplomatic intercourse and the conclusion of political and other treaties with foreign States. (See Constitution of the U.S.S.R. of July 6, 1923, art. 1.) Other important items are the direction of foreign and internal trade, the organization and direction of the armed forces of the Union, the establishment of a single currency and credit system, the settlement of controversies arising among the several constituent Republics, etc.

The supreme authority of the Union of Soviet Socialist Republics is vested in the Soviet Congress,[1] and during the intervals between the sessions of the Congresses in the Central Executive Committee of the Union of the Soviet Socialist Republics, consisting of the Council of the Union and the Council of Nationalities. Ordinary congresses of the Union are summoned by the Central Executive Committee of the Union either on its own initiative, or upon the request of any two Republics of the Union. Under extraordinary circumstances, preventing the meeting of the Congress of the Union at the appointed time, the Central Executive Committee may postpone the summoning of the Congress.[2]

Sweden.—The Swedish Parliament, or "riksdag,"[3] consists of two Chambers which are both elected by the people. Members of the First Chamber are elected for a term of eight years, their term beginning with the month of January following the elections.[4] The constituencies are divided into eight groups; and in one of these an election takes place annually in the month of September.[5]

The Members of the Second Chamber, or Lower House, are elected for a term of four years beginning in January following the election.[6] The elections of Members of the Lower House must be held in September, on a date to be designated by special law, preceding the year during which a new four-year term of such Members begins.[7]

The Swedish Constitution, as amended up to date, provides that Parliament must convene in regular session on January 10 of every year,

[1] The Congress of the Union is composed of Representatives of urban and township soviets on the basis of one Deputy for every 25,000 voters, and of Representatives of provincial soviet congresses on the basis of one Deputy for every 125,000 inhabitants. Representatives to the Congress of the Union are elected at the provincial congresses of Soviets. In those Republics which have no provincial congresses the delegates are elected directly at the soviet congresses of the respective Republics.

[2] See Constitution of the U.S.S.R. of July 6, 1923, arts. 8–12.

[3] See "Riksdagsordning, dat. Stockholm den 22 juni, 1866, med de därefter, och sist vid riksdagen i Stockholm år 1925, av Konungen och riksdagen antagna förändringar [law concerning the Swedish Parliament, dated Stockholm, June 22, 1866, as amended up to March 1925]," in *Svensk Författningssamling*, 1925, Nr. 50, pp. 71–91. See also "Regeringsform, dat. Stockholm den 6 juni, 1809, med de därefter, och sist vid riksdagen i Stockholm år 1921, av Konongen och ricksdagen antagna förändringar [Swedish Constitution of June 6, 1809, as amended up to March 1921]," in *Svensk Författningssamling*, 1921, Nr. 91, pp. 279–99. For an English translation of the Swedish Constitution see Dodd, W. F., *Modern Constitutions*, vol. 2, pp. 219–51. See also Olsson, Oscar, *Svenska Folkets Valhandbok med översikt av Riksdagsordning och Kommunalförvaltning*, Stockholm, 1919. The First Chamber, or Upper House, is comprised of 150 Members, chosen by the Members of the "Landstings," or provincial assemblies, and by the electoral bodies in the cities. The Second Chamber, or Lower House, has 230 Members.

[4] See Riksdagsordning, art. 6.

[5] *Ibid.*, art. 7.

[6] *Ibid.*, art. 13. The elections are held in accordance with proportional, universal and direct suffrage; all men and women who are Swedish citizens and over twenty-three years old having the right to vote (*ibid.*, art. 16). Their status, however, must be such that it does not come within the disabilities clause.

[7] *Ibid.*, art. 17.

or on the day following if this day happens to be a holiday.[1] Under the Constitution the King is authorized to call an extraordinary session of Parliament in the intervals between the regular sessions.[2] If Parliament is summoned by the King, Regent or Council of State, the time of meeting fixed must not be less than seven days nor more than twenty days after the summons is published in the general newspapers.[3]

Regular sessions of Parliament may not be adjourned without its consent until after a period of four months, unless the King, in accordance with the provisions of the *riksdagsordning* (the Law concerning the Parliament), orders a new election of one or both Houses. If a new election is ordered Parliament must reassemble within three months after the dissolution, upon the date determined by the King, and, preserving its character as a regular session, may not again be adjourned until after four months from the date of its last assembling. The King is authorized by the Constitution to close an extraordinary session whenever he thinks fit ; however, he *must* close it before the time fixed for the meeting of the regular session.[4]

Turkey.—The Turkish Grand National Assembly [5] is elected for the term of four years. Members whose terms have expired are eligible for re-election. An Assembly is considered to be in session until the formation of a new one.[6] If for some reason or other it should be impossible to proceed to a general election the term of the retiring Assembly may be extended for another year.[7]

The Constitution provides that the Grand National Assembly shall convene automatically each year on the first day of November. The Assembly must be in session at least six months of every year.[8] A special session may be called not only by the President of the Republic or the Prime Minister, but by a quorum of one-fifth of the Representatives of the Assembly.[9] If the Grand National Assembly decides that new elections to that Chamber are to be held prior to the expiration of its normal term of four years, the session of the new Assembly is to begin on

[1] Regeringsform, art. 49.

[2] Such extraordinary sessions may consider only matters which caused its being called or other matters submitted to it by the King, and questions which are inseparably connected with such matters (see *ibid.*).

[3] Regeringsform, art. 51. [4] *Ibid.*, art. 109.

[5] According to the Turkish Constitution adopted on April 20, 1924, the Grand National Assembly is the sole and real representative of the Turkish people and exercises the exclusive right of sovereignty on behalf of the Republic of Turkey (Constitution of April 20, 1924, art. 4). For a translation of the Constitution see *Political Science Quarterly*, vol. 40, No. 1 (March, 1925), pp. 89–100. This translation is reprinted in Toynbee, A. J., and Kirkwood, K. P., *Turkey*, New York, Scribner's Sons, 1927, pp. 302–12. The present Grand National Assembly, which was elected during the early summer of 1923 and met on August 11, 1923, has 286 Deputies.

[6] Constitution, art. 13. All Turkish citizens who have attained the age of eighteen years are entitled to vote. (art. 10).

[7] *Ibid.* [8] *Ibid.*, art. 14. [9] *Ibid.*, art. 19.

the first day of November following. If it should be necessary to hold a session before that date, such session shall be considered as a "special session." [1]

Union of South Africa.—The South Africa Act, 1909, vests the legislative power in the Parliament of the Union, which consists of the King, a Senate and a House of Assembly.[2] The Governor-General is authorized to appoint such times for holding the sessions of Parliament as he thinks fit. The said Act provides, however, that there must be a session of Parliament at least once every year.[3] The Governor-General may also from time to time, by proclamation or otherwise, prorogue and dissolve Parliament, either both Houses simultaneously, or the House of Assembly alone.[4]

Of the forty Members who comprise the Senate eight are nominated by the Governor-General in Council, and thirty-two are elected.

The House of Assembly consists of 135 Members [5] directly chosen by the voters of the Union in electoral divisions. Each House of Assembly is to continue for five years from the date of its first meeting. It may be sooner dissolved, however, by the Governor-General.[6] As to the date of the general elections the said Act stipulates that all polls must be taken on one and the same date in all the electoral divisions of the Union. The fixing of the date for such elections is left to the discretion of the Governor-General in Council.[7]

Conclusion.—Of the twenty countries considered above, which include the principal countries of the world, it may be seen that the United States of America is the only one where it is lawful for legislators to continue in office for months after the vote at the polls has shown that they no longer possess the confidence of the people. In order to remedy this situation, Senator Norris, on December 8, 1925, introduced into the Senate of the United States a joint resolution proposing an amendment to the Constitution fixing the terms of the President and Vice-President and Members of Congress, and also fixing the time of the assembling of Congress. This joint resolution, which on February 15,

[1] Constitution art. 25. The Grand National Assembly has the following powers and duties under the Constitution: To execute the holy law; make, amend, interpret and abrogate laws; negotiate and conclude treaties; conclude peace and declare war; examine and ratify the budget; control the issue and coining of money; accept or reject all contracts or concessions involving financial responsibility; decree partial or general amnesty; mitigate sentences or grant pardons; order the enforcement of sentences involving capital punishment handed down by the courts (see Constitution, art. 26).

[2] 9 Edward VII, c. 9, sec. 19. [3] See *ibid.*, secs. 20 and 22.

[4] The dissolution of the Senate, however, is not to affect any Senators nominated by the Governor-General in Council. See *ibid.*, sec. 20.

[5] Of these the Cape of Good Hope elects 51 Members, Natal 17, Transvaal 50 and the Orange Free State 17 Members. The South Africa Act, 1909, provided for the election of 121 Members, but stipulated that the number may be increased from time to time. See sections 33–4.

[6] *Ibid.*, sec. 45. [7] *Ibid.*, sec. 37.

1926, passed the Senate for the third time [1] in its amended form as it was passed on the date, reads as follows [2]:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment of the Constitution be, and hereby is, proposed to the States, to become valid as a part of said Constitution when ratified by the legislatures of the several States as provided by the Constitution:

Article.

Section 1. The terms of the President and Vice-President in office at the time this amendment takes effect shall end at noon on the third Monday in January and the terms of the Senators and Representatives then in office at noon on the first Monday in January, of the year in which such terms would have ended if this article had not been ratified, and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year and such meeting shall be on the first Monday in January unless they shall by law appoint a different day.

Sec. 3. If the House of Representatives has not chosen a President, whenever the right of choice devolves upon them, before the time fixed for the beginning of his term, then the Vice-President chosen for the same term shall act as President until the House of Representatives chooses a President; and the Congress shall by law provide that in the event the Vice-President has not been chosen before the time fixed for the beginning of his term, what officer shall then act as President, and such officer shall act accordingly until the House of Representatives chooses a President, or until the Senate chooses a Vice-President.

Sec. 4. This amendment shall take effect on the fifteenth day of October after its ratification.

On the following day the joint resolution was referred to the House Committee on election of President, Vice-President and Representatives in Congress, and on February 24, 1926, with certain amendments, was referred to the House Calendar. Nothing more was heard of it since. If such a law were in force now, a new Congress elected in November could convene in January, and no legislators who have not been re-elected would be seated in Congress.

It has sometimes been suggested that the proposed constitutional amendment is unnecessary, and that, since the Constitution expressly provides that Congress shall assemble on the first Monday in December "unless they shall by law appoint a different day," Congress could therefore by *law* determine upon an earlier date for the meeting of Congress without amending the Constitution. Any proposal of this kind, however, does not take into consideration the fact that at present the new term of Congress begins on the fourth day of March, so that, even

[1] The joint resolution passed the Senate on Feb. 15, 1926, by a vote of 73 to 2. See *Congressional Record*, vol. 67, pt. iv, p. 3971.

[2] U.S. Senate, Joint Resolutions, 69th Congress, 1925–7 (first session), S.J. Res. 9. See also *Cong. Rec.*, vol. 67, pt. iv, p. 3968.

if Congress would change the date of its meeting from December (*i.e.* thirteen months after election) to January (or about two months after election) it would still be the old Congress that would assemble. The question then arises as to whether or not Congress may by law change the date of inauguration without amending the Constitution. According to the Constitution the length of the terms of Representatives is fixed at two years, the terms of Senators at six, and that of the President at four years. Since, however, any change in the date of the inauguration would also mean a change in the length of the terms of Members of Congress and of the President it seems evident that such a change cannot be carried into effect without an amendment of the Constitution.

NOTE.—Since this article was written the United States House of Representatives on March 9, 1928, voted after three days' debate on a measure intended to rectify the situation which allowed Members who were defeated at earlier elections to sit and continue in office. The vote on this constitutional amendment was 209 to 157. However, since constitutional amendments in the United States require a two-thirds majority for approval, the measure failed of acceptance.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Dominions and the Egyptian Negotiations.—The full explanations given by the Prime Minister of Canada in the Dominion House of Commons on March 30 indicate clearly how difficult it has proved in practice to interpret the rather confused terms of the resolutions of the Imperial Conference of 1926 as to the negotiation and ratification of treaties. These resolutions were arrived at in the usual way of Conferences as compromises, each side doubtless putting a slightly different interpretation on the implications of the agreement. The British Government, accordingly, in 1927, when drafting the proposed treaty with Egypt, relied on the rules laid down by the Conference as to ratification of treaties which for any reason ought to apply to the whole Empire.[1] These rules contemplate that in such a case full notification of the proposed treaty must be given to each Dominion, and that, if it does not object, it will be presumed to concur in ratification, unless any active obligations are imposed upon it, in which case, of course, express agreement must be obtained. The British Government, doubtless thought that the Egyptian treaty was one which should be accepted for the whole Empire, seeing that it might result in the United Kingdom being involved in war for the defence of Egypt, in which case the whole Empire must be at war, but did not think that acceptance imposed any active obligation to assist Egypt on the Dominions. The Canadian Government, on the other hand, held that, while it was perfectly willing that the treaty should be concluded for the United Kingdom, it did not desire to share in the signature or ratification, and this view was thereupon immediately accepted by the British Government, which limited the application of the treaty accordingly. It is doubtless from these considerations that we can explain the emphatic assurance of Lord Salisbury in the House of Lords on March 29 that the Dominions were never asked to take part in responsibility for the treaty and the Dominion Government's assertion to the contrary, for there is no doubt that the draft treaty in whose signature the Dominions were asked to concur was couched in the name of the King-Emperor without any limitation of its application to the United Kingdom, and that, if such limitation were intended, it ought under the terms of the Resolutions of 1926 to have been made

[1] See Sir C. Hurst in *Great Britain and the Dominions* (1928), pp. 78 ff.

explicit. The suggestion[1] that the action of the British Government was inadvertent may safely be dismissed. Moreover, it does not appear, from Mr. Bruce's attitude in the House of Representatives on March 8, that the Commonwealth Government would have objected to the original form of the treaty, The different attitudes of the two Governments can, of course, be easily explained, for the security of the British position in Egypt means something vital to the Commonwealth, while it is a matter of minor concern to Canada.

The Neutrality of the Dominions.—While the treaty for the time being has fallen through, a matter much to be regretted in the interests of Egypt and the British Empire alike, the discussion illustrates once more the difficulty of a clear comprehension of imperial relations, and one has sympathy for Lord Parmoor's view that some greater definition will in the long run be desirable. What would, under the treaty, be the position of the Dominions if Egypt were attacked and the United Kingdom were to take up the cause of Egypt, the assumption being that such action was permitted by the League of Nations Covenant? Mr. Mackenzie King has insisted once more on his belief that Canada should remain part of the British Empire, and has certainly indicated no dissent from Mr. Bennett's insistence that one part of the Empire cannot be at war without the other parts being legally involved. It is clear that no Government in the Commonwealth or New Zealand is ever likely to favour the idea of neutrality as possible; the impression in these Dominions prevails that the next great war may be one in the Pacific in which they will be primarily concerned, and the aid of the United Kingdom could not be counted on with adequate assurance if it was once laid down that the several parts of the Empire could be unaffected by a war between a foreign Power and another part. In the Irish Free State, of course, however strong the desire for a position of neutrality, the matter is complicated by the obligation of the treaty of 1921. Clearly under its terms[2] the Free State is bound to afford such facilities for the use of its territory by the United Kingdom in time of war that it could not be effectively neutral, and no foreign Power would have any temptation to respect a neutrality which would be wholly to its disadvantage, seeing that it would allow the United Kingdom to use the Free State as a military and naval base while exempting the Free State territory from attack.

General Hertzog's Claim to Neutrality.—General Hertzog, however, has once more raised the issue by insisting in the Union House of Assembly on March 8 on the absolute right of each Dominion to neutrality in a British war. He relied, *inter alia*, on a citation of the view of the Secretary of the State for Dominion Affairs on June 27, 1927, that "every Government of the Empire is, if it so wish, entitled to exercise

[1] Possibly implied in Lord Salisbury's remarks in the House of Lords on April 26, 1928. For the final form of the treaty see Parl. Paper Cmd. 3050.

[2] Articles 6 and 7.

every function of national and international right," a statement which, if it were to be taken literally, would justify General Hertzog's claim that he has British support for his view. General Hertzog, however, frankly admitted, in reply to Sir Thomas Watt, that the question of neutrality was not discussed at the Conference, and gave that as the reason why he had brought up the matter. It appears, therefore, that his view is still without support from the Conference, and that it must be judged on its merits. He made a most candid admission when he expressly recognized that the mode in which the Dominions appeared in the League of Nations Covenant was an outward sign of what was definitely agreed on when the Covenant was framed, namely, that the Dominions were also parts of one Empire, and that this status gave them a special position. The League, he asserted, could never claim from any Dominion the adoption of an attitude of hostility towards any other Dominion or the United Kingdom. But he held that the League could impose neutrality, in a contest in which the United Kingdom was engaged, on the Dominions, for that was not incompatible with membership of the British Empire, seeing that prior to 1919 the Dominions were free, without forfeiting membership of the Empire, to remain neutral in a British war. The whole contention seems to be based on a failure to distinguish between neutrality in a popular sense and neutrality in international law. The Dominions before 1919 were clearly free to decide whether or not they would give aid to the United Kingdom in war, but no one save General Hertzog considers that they could internationally have been neutral, and, this being so, his present argument rests on a false premise, in so far as it is put on the basis of the pre-1919 situation. He admitted, however, that the issue could hardly arise unless the League Council should find Great Britain to be the aggressor in a war, a very improbable event. General Smuts's reply on March 15 insisted that the issue could not be decided by one Dominion alone, and pointed out that the Empire would be much less than an alliance if neutrality were possible at pleasure, while he indicated the difficulties of the same King being both at peace and war, negativing the idea of the union as purely personal. The divergence of view rests, of course, on the same fundamental difference of outlook which has led General Hertzog once more to reiterate his belief in the abstract right of secession in his speech at Harrismith.[1]

The Empire and the Peace Pact.—It is impossible not to recognize that the conclusion of the Peace Pact must have a bearing on the issue of possible neutrality. The mode of dealing with the matter by distinct negotiations with each Dominion Government, which was suggested very properly by the British Government, marks the change of relations since the Washington Conference of 1921–2, but there are certain possible implications. The treaty is not one under League auspices, and League

[1] *The Morning Post*, July 30, 1928. Independence has now been dropped from the Nationalist programme.

understandings have no validity in regard to it. If the United Kingdom, reserving, as it has done, its right of self-defence and interpreting it to apply to Egypt or Iraq, should enter into war, what would the position of the Dominions be as regards neutrality? If a Dominion did not accept the view that such a war was a defensive war, it could of course refrain from active aid to the United Kingdom. But could it assert the right to remain neutral, or the duty of neutrality as flowing from its signature of the treaty, and the absence of any of the grounds which justify, under the interpretation of the treaty agreed on by the signatories, the undertaking of war by any signatory? The issue is clearly difficult, but the treaty affords General Hertzog's view a much more substantial argument than it hitherto has enjoyed, for a foreign Power, it is arguable, would not be able under the treaty to go to war with a Dominion which took no active steps to aid the United Kingdom in such a war as that above suggested.[1] All that need at present be said is that the ambiguity of the relations of the Dominions and the United Kingdom will doubtless do something to lessen the influence of the Empire in international affairs, and, in so far as that influence has been a factor making for peace, the result is to be regretted. A pact to renounce war, unsupported by any sanction, is no great security when contemporaneous with a state of society which seems to show that very little real conversion to a dislike of war as a means of national aggrandisement has taken place in the world. The pacific outlook of the United States and the United Kingdom alike has recently been held compatible with forcible imposition of their views on Nicaragua and Egypt, both nominally independent, though in fact client States.

The Effects of Neutrality.—That General Hertzog has not fully thought out the neutrality issue is unquestionably suggested by his attitude towards the practical question put by Sir Thomas Watt when he asked whether the British Admiral at Simonstown would be required to leave South African waters if the Union declared neutrality. The Prime Minister's answer was, "What has that to do with the right of neutrality?" Obviously, however, the issue is vital. If neutral, the Union could not permit the British fleet to make use of any South African port as a base of operations, and would be compelled to apply impartially to British and to foreign warships whatever rules were adopted as to admission and stay of such vessels in Union ports. Again, there is the fundamental difficulty as to trading with the enemy. It is not questioned that, on the outbreak of war in 1914, all British subjects in South Africa became liable to punishment for trading with the enemy as well as subject to the law of treason. Is it possible seriously to claim as a matter of law that the resolutions of a Conference, at which this issue was admittedly never raised, have vitally changed the law not

[1] The Irish Free State has explicitly declared that it is not bound by the British reservations to the Pact; see Mr. McGilligan's statement in the Dail on May 31, 1928. Russia and Egypt have quite legitimately declined to accept the British reservations.

merely of the Union but of the United Kingdom? It is significant of the very different view of the importance of the Conference held by the Commonwealth Government and Parliament that it was not until May 4, 1928, that the debate on the report of March 22, 1927, was resumed, and that the motion resolved on was merely to print the paper.

The British High Commissioner in Canada.—It is satisfactory that a decision has finally been taken to appoint a High Commissioner for the British Government in Canada, who will serve to act as an intermediary between the Dominion and British Governments, performing the functions in this regard which were formerly carried out by the Governor-General. The choice of title is obviously appropriate, and suggests assimilation of his position to that of the High Commissioner for the Dominion in London, of whose services in political matters increasing use has been made of recent years. The nature, in both cases, of these appointments illustrates the fact that the relations of the parts of the Empire are not those of distinct States united by a personal union. In that case both States would be represented by diplomatists, an idea emphatically rejected by Mr. Mackenzie King on May 28. So also, while communications between the two Governments may pass through the hands of these officers, this is merely facultative; the two Governments, through the departments of the Secretary of State for Dominion Affairs and the External Affairs Department, are in direct relations, a position which does not normally exist in the case of foreign Governments. The personality of the officer chosen to fill the post in the first instance is suggestive of the fact that part of his work, and probably not the least important, will be the effort to aid the Trade Commissioner in promoting trade between the United Kingdom and the Dominion. In the case of New Zealand, where communications still pass through the Governor-General, a liaison officer from the Foreign Office has been attached in a consultative capacity to the office of the Prime Minister; by a curious anomaly his salary will fall on British funds, a fact which renders quite inapplicable the argument of the Secretary of State on February 14 in the House of Commons that there are many precedents for the loan of imperial officers to Dominion Governments, seeing that payment has been regularly required in such cases from Dominion funds. The plan itself, though anomalous, is in accord with common sense. Common sense also has dictated the decision to permit the Governor-General in the Union to act as High Commissioner with control over the protectorates and Basutoland. It would obviously have been absurd to divorce the two offices merely because their combination in one person obscures the decision that the Governor-General should no longer represent the British Government as far as the Government of the Union is concerned. The decision renders it hardly necessary to secure British representation in the Union by a High Commissioner, nor does such action seem essential for the Free State, Australia or Newfoundland.

The Canadian Legation at Tokio.—The discussion on June 11 in the

Canadian House of Commons of Dominion representation at Tokio is important for the clear assertion alike by the Government which proposed the measure, and the opposition which objected to it, of the importance of Imperial unity. Mr. R. B. Bennett put the case against representation by a minister in the most effective manner possible. He contended, first, that there was no complaint that the existing system had worked unsatisfactorily; secondly, that there must be one Empire foreign policy, which was impossible if each Dominion might have a policy of its own; third, that the presence in foreign capitals of separate diplomatic representatives, by fostering such policies, was incompatible with the idea of partnership and a united Empire; and, lastly, the appointment of a minister to Tokio by Canada implied that the Dominion was a sovereign State. But the Dominion was not sovereign even internally, as the inability of Canada to alter its constitution and the paramountcy of imperial Acts proved; there could be "no such thing in international law as equality of status between Canada and Great Britain until such time as this country has the powers of a sovereign State and absolute independence both within and without our country," and to the attainment of such independence he was entirely opposed. Mr. Mackenzie King made no suggestion that he was in sympathy with the ideal of independence—which the acting Prime Minister, Mr. Lapointe emphatically disclaimed on August 29, and insisted instead that the ideal aimed at was self-dependence. He held that the old system of action through a single diplomatic representative implied a centralized control, but there were no longer any advocates of federation and few who would advocate any form of Imperial Council to manage foreign relations. The foreign relations of the Empire were a matter of joint control, and it was logical that each of the controlling parties should have its local representative who would express to the local representatives of the United Kingdom and the other Dominions the special interests of the Dominion, and in matters of common concern join with them in framing Empire policy, subject to the instructions of their several Governments. The presence at Washington of the British Ambassador, the Canadian Minister and the Irish Free State Minister was a potent factor in securing not the dissolution, but rather the unity of the Empire. He stressed also the advantage in having a Canadian at Tokio to bring home to the people of Japan the special viewpoint of Canada, and mentioned the concessions secured in regard to limitation of Japanese immigration by discussions between the two Governments. The last argument, of course, is not conclusive, as the original concessions from Japan were secured [1] long before any idea of Dominion diplomatic representation was mooted, and Italian restriction of emigration to Australia has been obtained by the Commonwealth, which does not favour at present distinct representation. But, on the other hand, it is clear that

[1] Mr. Lemieux acted with the aid of the British Ambassador (Keith, *Responsible Government in the Dominions* (1912), ii, 1089).

the appointment of a minister by Canada—or rather by the King on the advice of the Dominion and Imperial Governments—in no way implies that Canada is an independent State, or a State possessing full sovereignty. States with very varying degrees of sovereignty have often the right to accredit and receive ministers; the cases of Iraq and Egypt are obviously in point. Equality of status, of course, is at present an ideal; the Union of South Africa depends entirely for naval defence on the United Kingdom,[1] while Canada has the additional security of the Monroe doctrine. But separate representation at foreign Courts is a legitimate mode of working out the ideal, though certainly not a necessary mode, and in any given case there may be distinct advantage in following it; many Canadians who are not interested in the theory of the matter accept as legitimate the presence of Canadian Ministers at Washington and at Paris in view of the enormous importance of Canadian relations with the United States and the special racial ties between French Canada and France. On the other hand, equality of status can as fully be maintained if the instructions sent to British representatives represent agreement with the Dominions, the view at present favoured by the Commonwealth and New Zealand alike, and even in the case of Canada there is no immediate intention of a wholesale appointment of envoys. Of vital importance is the rule of co-operation stressed by Mr. King; Dominion representations made with the sympathy of the British Ambassador stand in a very different position from representations made by minor Powers.

Irish Constitutional Reform.—Though under the Constitution all legislative and other authority in the Irish Free State is derived from the people, the Free State has definitely declined to trust the people to act otherwise than through its representatives in Parliament. The principle of the referendum was included in the Constitution as a democratic provision, and, while it was found impossible to agree on the initiative, it was left open to Parliament to establish it, and it was provided by Art. 48 that, if it failed to act within two years, then on a petition of not less than 75,000 voters it must either establish the initiative on lines defined in the Constitution, or place the issue before the people by a referendum. No inclination has been displayed by Parliament to allow the people to initiate laws, but the matter became urgent only on the presentation on May 16 of such a petition signed by some 96,000 voters by Mr. de Valera.[2] The purpose of the petition was made perfectly clear; it was not confined to asking for the provision of a general system but specified a particular point to be submitted to the initiative, namely, the deletion from Art. 17 of the Constitution of the requirement of the taking of the oath prescribed in the treaty of December 6, 1921. The Government of the Free State naturally determined to resist the

[1] See Col. Creswell's statement in House of Assembly, May 7, 1928.

[2] See also *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, pp. 249–51.

proposal of Mr. de Valera, but was inevitably involved in considerable difficulty in view of the clear terms of Art. 48 of the Constitution. Ultimately the issue was evaded on a dilatory amendment providing for postponement of consideration of the question pending provision by Parliament for the procedure as regards presentation of petitions under the Article. This was followed up by the passing of a measure to abolish the initiative, and also the referendum which is allowed under Art. 47 of the Constitution. That article permitted two-fifths of the Dail or a majority of the Senate to secure the suspension for ninety days of any measure, and its reference to the people if demanded by a twentieth of the voters or three-fifths of the Senate. It was justified by those responsible for the Constitution by the view that it asserted popular sovereignty, and it could be defended on the score that the powers of the Senate are so small that practically one-chamber government exists, rendering it desirable that the people should be saved from hasty legislation passed by a small majority, and possibly not satisfactory to the people as a whole. The Government, however, declared that, in view of the wide franchise and proportional representation, the referendum and the initiative were unnecessary, and the measure was carried in both Houses on a party vote. Moreover, it was agreed that the Bill was necessary for the immediate preservation of the public peace and safety, and thus it was carried without itself being submitted to the people for approval. It must be admitted that there is much force in the view of Sir John Keane that no case could be made out for a declaration of urgency, thus depriving the people of the right to express a considered view on so vital a change as the deletion of both the possibility of the initiative and the referendum from the Constitution. Incidentally Mr. de Valera made out a strong case that the treaty of 1921 did not impose on members of Parliament the necessity of taking the oath in question. He contended that all that the treaty imposed was the form of oath to be used, if the members took any oath at all. The contention is ingenious, and, if the principles of private law interpretation were applicable to the treaty, the view might be upheld. But the plain intention of the treaty is otherwise,[1] and it may be added that the Constitution was not accepted by the British Government as in conformity with the treaty until the Article (17) had been inserted, which requires definitely the taking of the oath.

The Reform of the Senate.—As some compensation for the loss of the power to bring about a referendum the Senate will receive a somewhat extended right to hold up measures which have passed the Dail. At present the time allowed is only 270 days, while under the new arrangement the limit will be extended to eighteen months in the first instance. If no agreement then exists, the Dail may again send up the measure, and may pass it over the head of the Senate if not accepted within sixty days, giving thus practically twenty months' delay, while, if there is a

[1] Cf. Tsune-Chi Yü, *The Interpretation of Treaties* (1927).

dissolution, the Dail may proceed at once to send the measure up again, without waiting for the full eighteen months. Moreover, Senators will no longer be elected by the whole State acting as one electorate by proportional representation, but by the Dail and the Senate acting together, and the Labour Party opposed the measure on the ground that the Senate was thus given power to hold up the legislation desired by the popularly elected body at the same time as it ceased to have a direct popular mandate. Less contentious are the governmental proposals to reduce the term of Senators from twelve to nine years, a third of the membership of sixty retiring every three years, though there seems much on principle to be said for Mr. de Valera's proposal that, if the Senate were not abolished as useless, the term of office should be fixed at six years, with a membership of thirty-six and biennial elections. What is clear and was not seriously denied was that the existing mode of electing Senators had no merits, while the evidence adduced suggests that the Senate during its period of existence has served hardly any useful purpose, even for the purpose of revising Bills.[1] Clearly the solution of the problem of creating a useful second chamber receives no light from the Free State experiment, so far as it has been operative.

The Indian States and the Crown.—In his recent and important work on *Indian Constitutional Problems*[2] Sir Sivaswamy Aiyer has discussed the issue of the relations of the Indian States to the Crown with regard, *inter alia*, to the claim of the Princes that they cannot be made subject to a constitutional responsible Government in India, if and when such a Government is created, without their own consent.[3] Sir S. Aiyer controverts this doctrine on the ground that the treaties and arrangements which govern the position of these Princes were concluded either by the East India Company on behalf of the Crown or by the Governor-General in Council acting for the Crown, and that in both cases the treaties bind the Crown not in its personal capacity nor as ruler of England but in the capacity of ruler of British India. It is, of course, clear that the treaties do not affect the Crown in a personal capacity, but the remainder of Sir S. Aiyer's argument is not so clear. The distinction between the Crown as ruler of England and as ruler of British India is a refinement which ignores the fact that from the beginning and down to the present day all treaties with Princes have rested ultimately on the authority of the responsible ministers of the British Crown. The issue, therefore, now is a very real one. Can the rights of the British Crown be handed over by authority of the British Parliament to a responsible Ministry in India without the sanction of the Princes? Legally, of course, the issue does not admit of discussion, but the question raised is not one of legal right, but of justice. For the British Government to transfer to any

[1] The Committee of the Senate and Dail which considered the merits of the Senate agreed on the necessity of reform.

[2] (Bombay, 1928), pp. 210–15.

[3] See Keith, *Constitution, Administration and Laws of the British Empire*, pp. 259–61; *Responsible Government in the Dominions* (1927), ii, 807, n. 3.

British Indian Government power to deal finally with the treaty relations between the Crown and the States would clearly be a revolutionary change, to which the Princes would have a strong moral right to object. No doubt, in the long run, the issue can be solved by transfer by agreement under some constitutional system [1] securing the States from undue interference, while protecting their people from political stagnation, but for the present nothing effective seems practicable, and it is impossible not to express hearty agreement with Sir S. Aiyer's own conclusion [2] "that the policy of *laissez faire* and of non-interference in the affairs of the States is the wisest one to be followed."

The Writ of Habeas Corpus.—It is not often that the Judicial Committee is called upon to determine an interesting point of English constitutional law as an essential preliminary to a decision of a question of colonial law. In *Eshugbayi Eleko* v. *Nigeria Government Officer* [3] the issue was raised whether or not in the Supreme Court of Nigeria, where practice is governed by English law, it was in the power of a chief against whom a deportation order had been made by the Governor to apply first to the acting Chief Justice for a writ of *habeas corpus* in order to test the validity of the Governor's deportation order, and then on the decision of that judge being in favour of the validity of his detention, to apply to another judge of the Court. Not unnaturally the judge applied to held that the Attorney-General of Nigeria rightly contended that no second application lay on the same materials, and that the decision of the acting Chief Justice disposed of the matter, and on appeal the Full Court in a considered judgment on June 1, 1926, upheld his ruling. It was, therefore, necessary on appeal for the chief to establish that the English rule permitted successive applications to judges of the Supreme Court, and against him could be cited the dictum of Lord Esher in *Ex parte Cox* [4] as well as the New Zealand decision *Ex parte Bouvy* [5] and the Canadian decision *In re Loo Len*.[6] Nevertheless, the Judicial Committee had no great difficulty in deciding that the right to apply for a *habeas corpus* is not limited to a single application. Prior to the Judicature Act, 1873, applications could, of course, be made to the three Courts of Common Law and to the Chancery, and it would have been remarkable had that Act by unifying the Courts reduced drastically the privileges of the subject. Moreover, a rather absurd anomaly would have thus been created, for the Act of Charles II [7] empowers any judge to grant a *habeas corpus* in vacation, and imposes a heavy penalty for failure to deal with an application, and on the interpretation suggested a prisoner would be far better off in vacation than when the Courts were sitting. Finally, it was actually found that an application had been made in one case [8] to the Lord Chief Baron at Chambers, and then to the

[1] Suggestions for such a scheme by Sir Leslie Scott have not yet assumed definitive shape.

[2] *Op. cit.*, p. 262. [3] 44 T.L.R. 632. [4] 20 Q.B.D., 1, 13.
[5] 18 N.Z.L.R. 601. [6] [1924] 1 D.L.R. 910. [7] 31 Chas. II, c. 2, s. 9.
[8] *Ex parte Partington*, 13 M. and W., 679.

Court of Exchequer, which determined that it was its duty none the less to hear the case on its merits. The Privy Council, therefore, ruled that a similar duty was incumbent on each judge of the Supreme Court of Nigeria. It is obvious that the right of application may be abused, but this mere possibility need hardly be deemed of much importance ; moreover, if it is found objectionable, there can be no insuperable difficulty of legislating in the matter.

Direct Taxation in Canada.—The attempts of provincial governments in Canada to increase their revenues by indirect taxation disguised as direct taxation, which is permitted to them by s. 92 of the British North America Act, have been many, but the appeal in *Rex* v. *Caledonian Collieries, Ltd.*,[1] would appear to have been of the type that was hopeless *ab initio*, especially as the Supreme Court of Canada was for once unanimous on the issue. Alberta in 1918 imposed a Mine Owners Tax of five cents on each ton of coal removed from the mining premises, but so obvious was the indirect character of the tax that many owners declined to pay. The legislature accordingly in 1923 passed another Act repealing the Act of 1918, but imposing from May 31, 1918, a tax on gross revenue, not exceeding 2 per cent. There could be no real distinction between the new and the old tax, and it is not surprising that the high ingenuity of the arguments for the province did not convince the Supreme Court[2] or the Privy Council. It was suggested that a tax on coal sold was direct, because, when the sale took place, the tax had not become payable, and therefore could not be passed on to the purchaser, the criterium of an indirect tax; but obviously there is no difficulty in adding to the price in advance a sum to cover the tax, and it is common knowledge that this is the procedure adopted. More ingenious was the comparison with an income-tax, which is deemed direct, but the difference between a tax on gross revenue and on profits is manifest ; there may be much gross revenue, but no income-tax may be payable. It is, of course, true that the distinction between direct and indirect taxation has little logical value, but, as it is enshrined in the Dominion Constitution, the Courts must make the best of it.

The Educational Issue in Ontario.—The latest decision[3] by the Privy Council on the educational controversy in Ontario affords an interesting example of the chief value of the Judicial Committee to Canada, namely, as a means of finally deciding issues in which racial and religious feelings are involved. It is significant that the case was decided without hesitation in favour of the Ontario Government by the Courts of Ontario,[4] but that the Supreme Court[5] was equally divided on two of the three essential issues, and only on one was there a majority of four against two in favour of the Government. It is undoubtedly more satisfactory

[1] 44 T.L.R. 622.

[2] [1927] S.C.R. 257.

[3] *Tiny Township Roman Catholic Separate Schools Trustees* v. *The King*, 44 T.L.R. 611.

[4] 59 O.L.R. 96 ; 60 O.L.R. 15.

[5] [1927] S.C.R. 637.

to all concerned that there should be a definite decision by the Privy Council. The claims made by the Tiny Township Roman Catholic Separate School Trustees were of the most far-reaching character and would have made a very great difference in regard to higher education in Ontario. They claimed (1) that the trustees of separate schools should be entitled to give such courses of study in the schools under their charge, including the courses now given in high schools, continuation schools and collegiate institutions, as the trustees might think fit; (2) that supporters of the separate schools should be exempt from taxation for the support of these secondary schools in the same manner as they are exempt from taxation for the support of the public schools of the province; and (3) that each separate school should be entitled to an arithmetical share of all legislative grants for the support of both public and secondary schools on the basis of the average attendance at each school as compared with the average numbers attending public and secondary schools in the same municipality. They thus demanded a great extension of their *de facto* privileges, and it is not surprising that the Government of Ontario strenuously resisted the demands. The matter for the decision of the Courts turned entirely on the state of the law at federation, for by s. 93 (1) of the British North America Act the exclusive power of the provinces to legislate as to education is conditioned by the rule that "nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union." The state of the law at the union had been brought about by the gradual extension to Upper Canada of privileges for Roman Catholics in the matter of separate schools, the last Act, that of 1863, having been passed contrary to constitutional usage by a majority which did not include a majority of the members of the legislature for Upper Canada. The Privy Council found, without great difficulty, that the law at union left the power of the province free to regulate the nature of the courses to be given in the separate schools, and did not confer on the Roman Catholic community any right to demand the power to maintain schools for secondary education, and, therefore, to be exempt from taxation imposed by the province in respect of such education. As regards the distinct issue of money grants, which was not necessarily disposed of by the decision on the issue of regulation, the Judicial Committee found that the legislature in 1863 merely provided for *pro rata* application of the residue of grants not otherwise specifically appropriated, and that, therefore, it was still open to the legislature to make such specific appropriations as it deemed desirable without infringing any right of the Roman Catholic community. One contention upheld by the Courts in Ontario their Lordships naturally dismissed; the Act of 1863, in directing apportionment of funds, referred to the funds annually granted by "the legislature of this province," and it was argued in Ontario that the provision could not apply to the newly created Ontario and referred only to the defunct province of

Canada. It is clear that such an interpretation would have destroyed the value of the safeguard in s. 93 (1) of the British North America Act.

Remedial Legislation by the Dominion.—It is perhaps unfortunate that the Judicial Committee was not content with its excellent analysis of the Canadian legislation, but that it rather went out of its way to suggest that there might be a case for application to the Governor-General in Council under s. 93 (3) of the British North America Act which provides that an appeal shall lie to that authority " from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." By s. 93 (4) the Dominion Parliament may legislate if the province will not pass any Act which may be deemed by the Governor-General in Council proper to be enacted in the circumstances. In view of the fatal results to the Conservative Government [1] in 1895–6 of the effort to coerce Manitoba, the suggestion of Dominion action can hardly be acceptable to the Dominion Government, which would be placed, if an appeal were made, in a most difficult position between the wishes of its supporters in Quebec and the objections of all the rest of Canada to the coercion of a province. As the question was not before their Lordships their remarks on it are *obiter*, but it must be noted that they seemed to be prepared to admit that the Governor-General in Council could take account of matters arising out of *de facto* administration, a view denied by the Judicial Committee in *Maher* v. *Town Council of Portland*.[2] Moreover, they quite definitely committed themselves to the view that the provisions of s. 93 (3) apply to Acts of the provincial legislatures. This has never before been decided, for in *Brophy* v. *Attorney-General for Manitoba* [3] the case turned on the Manitoba Constitution Act, which expressly includes any Act or decision of the legislature of the province as well as of any provincial authority. In adding that the point may prove to be of great importance if there is hereafter an appeal to the Governor-General in Council, their Lordships seem to contemplate such an appeal and to go some way to indicating their attitude towards it, while on principle they normally are specially careful never to decide anything regarding the Constitution that is not essential for the consideration of the case. It is true that these dicta do not bind the Judicial Committee, but there is strong ground to assume that the view indicated would be deemed almost binding, if the case came before the Privy Council again. Yet this is a case where in the interests of provincial harmony finality was specially desirable.

Educational Rights of Protestants in Quebec.—While protests by the Roman Catholic minorities in Canada have been the cause of frequent reference to the Courts, it turns out that the Protestant minority in

[1] Keith, *Responsible Government in the Dominions* (1912), vol. ii, pp. 691–6.

[2] Wheeler, *Confederation Law*, pp. 338, 367; apparently approved by the Judicial Committee in *Hirsch* v. *Montreal Protestant School Commissioners*, [1928] A.C. 200.

[3] [1895] A.C. 202.

Quebec has since 1903 been suffering under a grave disability imposed by a Quebec statute, which only now has been declared in certain essential matters to be *ultra vires*.[1] The Quebec Act of 1903 was passed in order to remedy what was held to be a defect in the Act of 1899, under which it had been ruled that the Protestant Board of School Commissioners of Montreal was not bound to admit a Jewish child to the schools under their control. The legislature in a truly remarkable manner then provided that persons professing the Jewish religion should for school purposes be treated in the same manner as Protestants, and that their children should have the same rights to be educated in the public schools of the province as Protestant children and should be treated in the same manner as Protestants for all school purposes. It is amazing to record that in the appeal counsel were found to argue before the Privy Council that the word Protestant meant non-Catholics and included Jews, a suggestion summarily dismissed by the Judicial Committee. The anomalous provisions of the Act of 1903 gradually came to be realized when the Protestant Board found that it was actually having to pay more for the education of Jewish children than it received from taxes and allowances on their account, and, the issue having been raised, it was realized that the Act was fundamentally objectionable in its assumption that Jews were Protestants. The reference of its validity to the Courts was authorized, and the Judicial Committee, varying in certain respects the decision of the Supreme Court,[2] has finally given a perfectly clear ruling. The Act of 1903 is held to be invalid in so far as it would give the right to persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners of Montreal or Quebec or to any Protestant Board of Examiners, or to take part with Protestants in establishing a dissentient school outside these cities; moreover, it cannot authorize the attendance of Jewish children at Protestant schools outside Quebec or Montreal. In Quebec and Montreal Jewish children can attend Protestant or Roman Catholic schools, but there is no power in the legislature to compel those in charge of the schools to appoint Jewish teachers for such children. On the other hand, the legislature has the fullest authority to set up separate schools for non-Christians, the obvious and just solution of the legitimate needs of the important Jewish community.

Escheats and Bona Vacantia.—At long last the Privy Council has cleared up most of the remaining doubts on these interesting points in their relation to the rights of the provinces and the Dominion in Canada.[3] Alberta has, like Saskatchewan and Manitoba, a special relation to the Dominion in that on creation the Dominion reserved to itself "all Crown lands, mines and minerals, and royalties incident thereto," in lieu of handing them over to the provinces as was done under s. 109 of the

[1] *Hirsch* v. *Montreal Protestant School Commissioners*, [1928] A.C. 200.

[2] [1926] S.C.R. 246.

[3] *Attorney-General for Alberta* v. *Attorney-General for Canada*, 44 T.L.R. 651.

British North America Act in respect of the original provinces. On the face of the provision of s. 21 of the Alberta Act there could be no real doubt that Alberta had no claim to any escheats in respect of Crown lands granted by the Dominion after the creation of the province. All that might be plausibly enough argued was that the lands granted before, if they escheated, would belong to the province, the reservation being merely in respect of lands held thereafter as Crown lands and granted to private persons.[1] This claim, however, was clearly doubtful and it was definitely disallowed by the Supreme Court,[2] with which the Judicial Committee had no difficulty in agreeing. Alberta, however, had another resource; the power of making laws as to property and civil rights within the province is provincial, and in 1915 by c. 5 an effort was made to use this power so as to provide that property on failure of heirs would vest in the province. This attempt was manifestly *ultra vires*, for the power to deal with the property of the Dominion is by the Constitution, s. 91 (1), reserved to the Dominion, and the law was therefore ruled to be invalid by the Supreme Court in *Trusts and Guarantee Company* v. *The King*.[3] Nothing daunted, Alberta tried once more, inspired also by the desire to confer a valuable boon on her new University. By the Ultimate Heir Act, 1921, it was provided that, if any person died intestate in respect of lands situate in Alberta, he should be deemed to have made a valid demise of the land to the University. The Act was supported by the province on the score that it was a simple enactment as to succession, and could properly be compared to the right of the province, which had been admitted, to allow an illegitimate child to succeed to land. The Privy Council refused to adopt this reasoning, which was rejected also by the Supreme Court of Canada. It insisted that in cases where there is doubt as to the validity of legislation the substance must be looked to, and that in substance the measure was not an attempt to regulate succession but to invalidate the reservation to the Dominion of royalties under s. 21 of the Alberta Act. There is nothing new in principle in the decision, but it is valuable as a reminder to the provinces that seeking to evade the Constitution is more profitable to the legal profession than to the province. *Per contra*, the Dominion advanced a claim equally untenable, for it actually tried to assert the right of the Dominion to *bona vacantia* on the plea that they had never belonged to the province before the Alberta Act and that no specific transfer was made by the Act. It was sufficient to disprove this claim that it made the reservation of lands in s. 21 quite needless, for that reservation was motived simply by the fact that under the general powers of the province on its constitution *bona vacantia* and land equally passed to the province, so that it was essential to reserve lands for the Dominion if it desired to retain control over them. The whole series of escheat and *bona vacantia* cases, however, may fairly be adduced as extreme examples of the litigiosity excited by federal constitutions.

[1] 22 Alb.L.R. 186. [2] [1927] S.C.R. 136. [3] 54 S.C.R. 107.

Dominion and Provincial Rights as to Bankruptcy.—The difficulty of reconciling Dominion powers and provincial rights is also illustrated by the contest between the province of Quebec and the Dominion regarding the validity of a provision of the Bankruptcy Acts of the Dominion under which a judicial hypothec on the real estate of a debtor, resulting in Quebec from the registration of a notice under Art. 2121 of the Civil Code, was postponed to a subsequent authorized assignment for the benefit of creditors generally. In *Royal Bank of Canada* v. *Larue and others* [1] the matter was complicated by a discussion as to the real effect of the Dominion Act, but it was held by the Privy Council to be intended to override the Quebec enactment, and therefore it had to decide whether such an enactment fell within the power of the Dominion under s. 91 (21) of the British North America Act to deal with bankruptcy and insolvency. The answer seems obviously in the affirmative, and their Lordships pointed to the fact that the Judicial Committee had already in *Attorney-General for Ontario* v. *Attorney-General for Canada* [2] asserted that the Dominion could deal with the effect of an execution on property under a Dominion bankruptcy law. The judicial hypothec of Quebec law was closely analogous to an execution, and it was perfectly reasonable to hold that it was superseded in operation under the Dominion Act. It was also pointed out that in other provinces the validity of the Dominion Act had often been recognized by the repeal of provincial provisions which conflicted with or covered the ground now definitely occupied by the bankruptcy legislation of the Dominion.

The Freedom of Inter-State Trade in Australia.—The Commonwealth Constitution has once more proved its capacity of causing inconvenience to business issues through the decision in *James* v. *State of South Australia*.[3] The question which there arose affected the efforts of the States to control the dried fruit trade in such a way as to secure the fair division of the profits of the business, in which many returned soldiers are engaged. It was clear that, as the local market was limited, it would be wholly unfair to allow some growers to dispose of their output in it, leaving to others only the less satisfactory export trade. South Australia,[4] therefore, like other States, provided for the creation of a board with power to determine where and in what quantities the output of dried fruits should be marketed, and it also authorized the board to divest owners of their property in dried fruits and to vest it in the State. The wisdom of the latter authority was demonstrated in the case in question, in which one of the owners declined to bear his share of the export quota and challenged the legality of the law. The High Court held that the section of the Act which enabled the board to decide where and in what quantities dried fruits should be marketed was invalid in so far as it affected interstate trade, on the ground that under s. 92

[1] 44 T.L.R. 267; [1928] A.C. 187. [2] [1894] A.C. 189, 200. [3] 40 C.L.R. 1.
[4] Act No. 1657; *Journal of Comparative Legislation*, Third Series, vol. viii, pt. ii, pp. 149, 150.

of the Constitution "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." On the other hand, it held that the provisions of the Act enabling the State to acquire the fruits, and so to dispose of them as owner in the manner which it preferred, were valid. The decision itself is interesting as it confirms the ruling in *W. & A. McArthur, Ltd.* v. *The State of Queensland*,[1] and shows that the contrary decision in *Duncan* v. *State of Queensland*[2] must be held to have been wrongly decided, another instance of the readiness of the High Court to reconsider its own pronouncements. It is, however, obvious that the result is extremely embarrassing, for the procedure by compulsory acquisition, though pronounced legal, is plainly inconvenient, and the Commonwealth has accordingly been induced to use its powers as to commerce to act in aid of the purpose of the States. The machinery of the Dried Fruits Act, which operates by way of requiring a licence for transport beyond State frontiers, is necessarily complex, and the validity of the Commonwealth action is not free from doubt. In its favour the Attorney-General[3] has very properly adduced the pronouncement of the majority of the High Court in the *McArthur* case, where it was laid down that, despite dicta to the contrary in earlier cases, it was to be held that the prohibition of s. 92 was confined to State as opposed to Commonwealth action. There remains, however, to be surmounted the obstacle of s. 99 of the Constitution which forbids the Commonwealth by any regulation of trade to give preference to any State or part thereof over any other State or part thereof. In the absence of any clear judicial rulings, it is wholly impossible to feel certain how far the Commonwealth Act can be made to operate consistently with the section. But in any event the whole episode illustrates vividly the difficulties arising under federal constitutions in effecting objects which are patently in the interests of the public as a whole, which are desired by all the responsible legislatures and governments concerned, but which run counter to vested interests.

The Maltese Constitution. — The change of government in Malta[4] was not long in bringing about the inevitable clash with the Senate, whose constitution under the Letters Patent is of a very distinctly conservative type. Of its seventeen members ten represent special interests, two each the nobles, clergy, chambers of commerce, graduates and Labour, while the remaining seven are elected by voters with a comparatively high property and educational qualification. The combination of parties which overthrew the existing Government could not expect to find the Upper House amenable, but it was clearly a grave error on the part of the Senate to carry the matter to the extreme length, first of postponing decision on the Appropriation Bill beyond the close of the

[1] [1920] 28 C.L.R. 530. *Cf.* Keith, *Responsible Government in the Dominions* (1927), vol. ii, p. 677.

[2] [1916] 22 C.L.R. 556.

[3] House of Representatives, April 26, 1928.

[4] *Journal of Comparative Legislation*, Third Series, vol. x, pt. i, pp. 120, 121.

financial year, and, second, of rejecting the schedule to the Bill by eight votes to six. The decision revealed at once the defect of the Constitution which permitted (s. 61) the Senate to reject outright a money Bill, though it could merely suggest amendments. It is clear that it was not expected by the framers of the Constitution that so extreme a step would be taken save with good reason, and they omitted to make any special arrangement to facilitate the overruling of the Senate in the event of the rejection of money Bills in general or supply Bills in particular. The only possibility, therefore, of action rested on the general power (s. 42) to override a decision of the Senate by a two-thirds vote of the total membership at a joint session of the two Houses convened after a second refusal to pass the Bill, a procedure manifestly too cumbrous in any event, and hardly likely ever to be effective in view of the small size of the two Houses (thirty-two and seventeen members). Unfortunately for the Senate, the power to amend the Letters Patent remains (s. 68) with the Crown, and accordingly, without parliamentary intervention, it has been possible for the Secretary of State to enforce a settlement based on creating the right of the Governor, in such a case as the rejection of an Appropriation Bill, to convene a joint session forthwith, at which a bare majority of the two Houses will decide the issue. The decision is manifestly in accord with common sense, but it remains difficult to explain why the Letters Patent were allowed to issue with so grave an omission, thus necessitating a very remarkable act of imperial interference with a self-governing colony.

NOTES.

Lord Haldane.—By the death of Lord Haldane the Society has lost one of its most eminent supporters.

It was characteristic of him that among all his many and varied activities he was able to give attention to the work of the Society. He attended the meetings of the Executive Council until shortly before his death. Lord Haldane's long experience in the Judicial Committee of the Privy Council no doubt enhanced his interest in comparative legislation. So many appreciations of Lord Haldane's great services to the country have appeared in the press that it is not necessary here to do more than to record the Society's gratitude to him.

His power of work was astonishing. At a time when he had a very large practice he was able to take a prominent and effective part in politics, speaking frequently both in the House and in the country, and to find leisure for philosophical pursuits. His Gifford Lectures *On the Pathway to Reality* were prepared during one of the most strenuous periods of his career.

The discreditable attacks upon him some years ago—almost inexplicable—have served only to bring out more clearly the supreme value of his work as Secretary of State for War.

Franco-Italian Draft Code of Obligations.[1]—The publication of the new draft Code of Obligations and Contracts which it is hoped will be adopted by the legislatures of France and Italy is an important event. It is an excellent illustration of comparative law put into practice. It will furnish for a long time matter for discussion among civilians on both sides of the Atlantic. On a future occasion we hope to have an article dealing more fully with some of the questions—numerous and important—raised by the draft. For the moment we can only notice briefly some of the principal alterations and modifications which it recommends.

To Professor Scialoja of Rome belongs the credit of having first suggested in an article published in 1916 that France and Italy might smooth out the differences between their respective laws, at any rate, in this important branch, and might agree upon a unified law for the two countries. This would, as he urged, merely restore a uniformity of

[1] *Projet de Code des Obligations et des Contrats*, Roma, Provveditorato Generale dello Stato, 1928.

law which had existed for many centuries up to the end of the eighteenth century.

There was, in fact, before the age of codification a common law of obligations (a term which, as English lawyers may be reminded, includes contracts, quasi-contracts and torts) which prevailed in the principal countries in Europe. This was the Roman law in the form which it had assumed in the works of the great modern civilians, principally Dutch, German and French—the modern civil law. No doubt there were some local divergencies, but the body of the law in this most important field was the same for Holland, France, Germany, Italy and Spain. Codification broke up this uniformity and stereotyped differences which, but for it, might have been removed. The suggestion of M. Scialoja, which has here borne such excellent fruit, was that the differences between the French and the Italian law were not so important as to exclude reconciliation. The work has been carried on for ten years, first by an unofficial committee of eminent lawyers representing the two countries, and, later, by two official commissions. The idea of unifying the whole system of law for the two countries has been advocated and has not been abandoned. But the Commission wisely decided to confine its labours for the time being to the matter of obligations as being the part of the law in which uniformity was most urgent, and at the same time most easy of attainment.

One of the principal advantages of a codified system of law consists in the greater possibility of periodical revision on a large scale by impartial experts. Piecemeal tinkering at codes by legislatures is very apt to breed more trouble than it cures, and successive French Governments have shown a restraint in this matter which is really astonishing. Since the Code Napoléon was published many important codes have seen the light, and the present Commissioners have been able to compare them. They say that the Code of Brazil of 1916 is one of the best.

The attitude of the Commissioners has been on the whole very conservative. They have changed nothing for the mere sake of changing, and their alterations of substance are comparatively few. But anyone at all familiar with the subject who compares this draft article by article with the French Code will notice a vast number of modifications suggested by the criticism of commentators or the divergent judgments of the Courts. The result is that if the draft is adopted the Code as to these matters will have a modern instead of an antiquated appearance.

To mention two points only. The old classification of the sources of obligations as arising from contracts, quasi-contracts, delicts, quasi-delicts, and from the authority of the law solely, has been quietly slipped overboard. The term *quasi-contrat* which generations of commentators and lecturers have criticized has been dropped. Instead of the two groups—delicts and quasi-delicts—as to the distinction between which there has been perpetual wrangling, we have now one group, namely *actes illicites*, as in the Swiss and the German Codes.

The solution of the long-vexed question as to the formation of contract is as follows :

A contract is made as soon as the offeror is informed that the other party has accepted his offer.

The acceptance must reach the offeror within the delay stated in the offer or within the normal delay required by the circumstances.

The offeror may treat as valid an acceptance which comes too late and may consider the contract as concluded provided that he notifies the other party immediately.

The offeror may revoke the offer any time before he has been informed of the acceptance. The acceptance may be revoked any time before the offeror has been informed of it.

If the offeror has promised to hold the offer open during a certain delay, or if this promise is implied from the nature of the business a revocation before the expiration of the delay does not prevent the formation of the contract.

An offer or an acceptance or a revocation is presumed to have come to the knowledge of the parties to whom it is sent as soon as it has been delivered at his address, unless he proves that by no fault of his it was impossible for him to obtain knowledge of it.

An acceptance which modifies an offer has merely the effect of a new offer (art. 3).

Volumes might be written on this, and no doubt will be. The English law, as laid down in *Adams* v. *Lindsell*,[1] seems more logical, and also better from the practical point of view. When the offeree sends off his acceptance he can set about doing the work, buying the goods, or whatever it is that he has agreed to do, and it may be highly inconvenient for him to wait till his acceptance can be presumed to have reached the offeror, who may be thousands of miles away. Many excellent French writers have adopted the English view, that is the theory of declaration, and the Courts have been divided. The question on the French law was therefore quite open.

If this draft had stopped at art. 2 we should have regretted the decision. But art. 3 modifies its effect considerably :

If according to the request of the offeror, or by reason of the nature of the business, performance by the acceptor is to precede his reply, in that case the contract is made at the moment when and at the place where the performance begins.

Intimation that the performance has begun must be at once communicated to the other party.

This leaves a good deal of latitude to the Courts. After all it does not matter very much which theory we prefer. The important thing is that the law should be clearly stated and that parties should know how they stand.

The treatment of the contract of lease and hire (*louage*) is vastly better than in the old codes, and there are two important changes of

[1] 1818, 1 B. and A. 681.

substance. One is that in case of damage by fire to the subjects let, the lessee is not liable if the lessor has been indemnified by insurance, the insurer being left to his remedy against the lessee if he can prove fault (art. 434).

The other is in regard to "improvements."

If the lessee has erected buildings and made other improvements which have added to the value of the subjects the lessor must pay him at the end of the lease either the cost or the plus value, provided that the improvements were made with his knowledge and that he did not object to them (art. 435).

Many other points must be held over. It is rather disconcerting to find the French version of the introductory report bristling with misprints.

F. P. W.

Swedish Parliamentarism.—Lack of information about Sweden in England has recently been the subject of complaint in a leading English newspaper, in which the writer states that there were many points about this northern country which would be of decided interest to the English people. While it is true that the southern countries are generally the field of more exciting political battles, it may also be true that an understanding of northern politics is necessary for a more comprehensive conception of world politics, although the writer would not go so far as to associate himself with the very complimentary statement that was made to him by a well-known British ex-Cabinet Minister that "Scandinavia is the hope of the world."

Perhaps from the English point of view Sweden is interesting more for her quaintness, where her Constitution is concerned, than for romantic fervour in national and international struggles. The Riksdag, the Parliament of Sweden, can indeed seldom lay claim to the staging of anything comparable to grand opera in the sphere of politics. It is nevertheless ancient and unique.

Perhaps the most outstanding feature of Swedish politics is the weakness of the Cabinet. The all-powerful element in the Constitution is the Riksdag itself. This curious state of things, which makes Swedish parliamentarism exactly the opposite of English parliamentarism, is largely based on the great development of the parliamentary committees. These are generally standing joint committees, and this fact goes far to explain their tremendous power. The parliamentary committees are the very essence of both Chambers and they therefore often hold a central place in Swedish politics.

The main function of the committees is to study and to criticize Royal Bills before these are handed over to the Chambers for general discussion. But the modest utterances which the committees are supposed to give very often grow out to a complete remodelling of the Bill. The committees are often so skilled in their functions that the

Bills are at the end unrecognizable ; and when this happens the Government is bound to recognize the bastard Bill as its legitimate offspring or resign. In practice this happens so frequently that the Cabinet takes these rebuffs as matter of course—as expected—and shows neither signs of disappointment nor intention of resignation. Indeed one of the important qualifications for the Swedish Cabinet is a certain thickness of skin.

The historical background of these quaintnesses of Swedish politics is traceable to their medieval origins. It was during the Middle Ages that the famous Swedish yeomen asserted themselves against royal despotism. Parliament became their bulwark against the King and through it they defended those conceptions of individual freedom which have long been traditional among the Nordic peoples. This bulwark showed its strength by its violent opposition to the adventurous whims of Karl XII, the prodigalities of Gustav III, the insanities of Gustav IV and the tyranny of the first Bernadotte, and it served a good purpose by staving off many anxieties and commitments.

But time has passed. The unscrupulous counsellors of the kings have become loyal Cabinet Ministers, governing in harmony with the Riksdag, and the monarchs themselves have become strictly constitutional. The present King, Gustav V, shares none of the vagaries of his predecessors. He is obviously not inclined to wrong the country, and the last thought that would occur to any of his Ministers would be that of robbing the country. Nevertheless, the Riksdag maintains its inimical attitude, and insists on viewing the Cabinet with traditional mistrust. It refuses to regard the Cabinet as anything else than a band of treacherous courtiers, ready to assist a despotic tyrant in the carrying through of his diabolic machinations. Thus it assumes the pleasantly romantic rôle of a trustee of the people against the excesses of medieval counsellors.

This curious conception of parliamentary Government is of course not general or official. Nevertheless, this traditional viewpoint seems still to have a very strong hold on a large section of the Swedish Riksdag, and it is furthermore maintained in several parliamentary customs and practices. Thus, one of the Standing Committees has the laborious task of examining the protocols of what has been said during the Cabinet's conferences with the King. These protocols are generally of very little interest, as all questions have already been discussed and in reality also decided at a previous Cabinet meeting. The Ministers' conference with the King is nowadays almost entirely a formal procedure. Nevertheless, the Swedish Riksdag regards it as a very important task to read through the protocols of what has been said during this dignified but uninteresting conference. Naïve peasants and learned professors vie with one another for election to the Standing Committee which has this very onerous task. The protocols do not contain any trace of high treason nowadays, but there are plenty of opportunities

for making futile and pedantic remarks. The traditional position of the Swedish Riksdag as a safeguard against a treacherous cabal or King must be maintained at any price.

The mistrust which exists in the Riksdag of any member of the Cabinet takes a very interesting form when the attitude of members of any political party towards their own leader in office is considered. It might easily have been expected that he could have been trusted to carry out his obligations towards his party. But this is far from being the case. As soon as he is in the Cabinet he is first of all a Cabinet Minister, and therefore dangerous. Indeed the right to censure him is not merely a traditional right, for it is exercised very often in practice. Half a century ago King Oscar invited Count Posse, whose party, the Farmers' Party, had a majority in the Lower House, to form a Cabinet. But when Count Posse asked the leaders of the Farmers to accept office with him, they bluntly refused to enter the Cabinet. "We will accompany you to the door," they said, "but no farther." And when Count Posse later on as Prime Minister tried to bring pressure upon them in the Riksdag, these stubborn peasants expressed their absolute refusal to vote "by order."

An interesting aspect of the extreme power wielded by the Riksdag and especially by its Standing Committees is in the fact that it is not necessary for any political party to have a majority in Parliament to enable it to take office. In fact as a rule the party in office, as is the case with the present Liberal Government, has only a minority following in the Riksdag. It would seem indeed that, where the Riksdag is concerned, the existence of a minority Government is favoured, on account of the wider exercise of power of interference which is thus granted to them.

Even in the exceptional case of the existence of a majority Government, the Cabinet has no power to direct and to control the work of the Standing Committees, as may be exemplified by the following rather piquant incident which occurred during the Liberal-Socialist Administration in 1918, under the leadership of Professor Eden and Hajaimar Branting. A prominent member of the then Cabinet told the writer that there was an occasion during the discussion of an important Reform Bill, when he spent some hours in a certain Stockholm restaurant with Branting. Suddenly a member of the Standing Committee which was dealing with the Bill in question burst into their conversation. "It's all right now," said the intruder. "What is all right?" inquired Herr Branting. The M.P. thereupon volunteered most cheerfully that a compromise had just been worked out in the Committee and the whole question amicably settled. Herr Branting was naturally very indignant, but his wrath was useless.

Some time ago an important Education Bill was introduced into the Riksdag, and a Committee was specially appointed to consider it. For several weeks the Committee worked in silence, while the Press and the public made constant inquiries as to what was going on inside. The

Cabinet itself seemed to have lost all control over the Committee. Eventually a consensus was reached. But this was not before the representatives of two parties on the Committee had met privately and reached a compromise. They returned to the Committee and carried the day with a bare majority. Such was the indignation of a member of the minority at this procedure that he tendered his resignation.

It will be seen that the Swedish Cabinet is far from being in a position which would justify any charge of tyranny being made against it. Furthermore, with the rise of modern democratic institutions the monarchical despotism of former days has been swept aside. In Sweden there exists nowadays no base for a strong and resolute executive power. Consequently there is no danger of an executive abusing its power, and this may have certain advantages. But according to a widely spread opinion another form of tyranny is developing There exists to-day in Sweden a considerable feeling that the powers of the Riksdag are too wide and a powerful campaign is being carried out by several of the most constitutional newspapers against the Swedish " parliamentary junta " of to-day. The constructive proposals offered are the establishment of a degree of control over the Riksdag by the Cabinet, similar to that already in existence in Britain.

Åke Thulstrup.

Jurisdiction of Mixed Courts in Egypt.—It has long been the established rule that the jurisdiction of the Mixed Courts in civil and commercial matters extends over all suits between Egyptians and foreigners of any nationality, even though the foreigner belongs to a State which was not a signatory of the Treaty under which the Mixed Courts were established and had not capitulatory privileges. This interpretation of the term " foreigner " used in the Decree of Organization of the Mixed Courts is confirmed by a long series of decisions. No difficulty was found in treating Bulgarians as " foreigners " for this purpose after the separation of Bulgaria from Turkey. But judging by recent decisions, much greater difficulty is being experienced in treating as " foreigners " the members of the new States recently carved out of the Ottoman Empire (Palestine, Syria and Iraq), and still greater difficulty in treating citizens of the new Turkish Republic as such. That there is a certain absurdity in according the privileges of mixed jurisdiction to former subjects of the Ottoman Empire may be admitted. The establishment of the Mixed Courts was designed to secure a certain privilege of jurisdiction and law for persons who were supposed in their home country to possess Courts modelled on Western principles, and staffed by judges of Western enlightenment. At the time the establishment of the Mixed Courts, 1876, the Native Courts of Egypt were in a perilous condition. They have long since been reorganized in accordance with Western ideas.

Whether, in view of this reorganization, the policy of the Mixed Courts in extending their jurisdiction by a process of interpretation over

all suits between "natives" and "foreigners" was altogether sound is not now in question. It is a fact that the term "native" was limited by this interpretation to include only persons of the same nationality as the Egyptians themselves. As the Egyptians were from an international point of view Ottoman subjects, all Ottomans were deemed "natives."

There can now be no question that, from an international point of view, Palestinians, Syrians, Iraquians and Turks are no longer of the same nationality as Egyptians; whence it would appear to follow that, on the basis of previous decisions of the Mixed Courts, they must now be treated as foreigners for the purpose of Mixed Court jurisdiction. There existed some authority in favour of this view even before the Treaty of Lausanne, but the signature of that Treaty, with its explicit abandonment by Turkey of all rights over Egypt, Palestine, Syria and Iraq, would, one might have thought, have made the position quite clear. This was the general opinion in the profession. It is, therefore, the more surprising to find the Mixed Court of Appeal adopting the view that Syrians are not to be deemed foreigners for the purpose of Mixed jurisdiction (*Rizgallah* v. *Zahar*, May 4, 1926, *Gaz. Trib. Mixtes*, XVIII, No. 12; *Clunet* 1927, p. 1161). The judgment is interesting, but by no means convincing. The principles on which it proceeds would appear to lead necessarily to the conclusion that Palestinians and Iraquians are in the same position as Syrians. The incompetence of the Mixed Courts in suits between Turkish subjects and Egyptians has also been affirmed by a decision of the Mixed Summary Court at Alexandria of February 14, 1927 (*Gaz. Trib. Mixtes*, XVIII, No. 28).

According to our English ideas, the decision of the Court of Appeal would bind the Court below, but this is of course not the case under the French system followed in Egypt. We find accordingly a very convincing judgment issuing from the Mixed Court at Mansourah, and dated November 15, 1927 (*Gaz. Trib. Mixtes*, XVIII, No. 11) in which a view is adopted in express opposition to that of the Court of Appeal.

The judge (M. Pennetta) in his judgment maintains forcibly that there is no logical ground for distinguishing between Bulgarians and Syrians in this matter. The Treaty of Lausanne has certainly been implicitly recognized in Egypt in various ways, and since it was, in the case of Bulgarians, admitted that the mere fact that they were Ottoman subjects at the time of the establishment of the Mixed Courts would not prevent their being treated as foreigners when they ceased to be Ottoman subjects, it seems to follow that Syrians should be treated in the same way. This view has also been adopted in another case before the Court at Mansourah, December 7, 1926 (*Gaz. Trib. Mixtes*, XVIII, No. 13, and see also as regards Palestinians XVI, No. 119).

The views adopted by the Court at Mansourah appear to be the more logical development of the previous rule as regards the interpretation

of the word "foreigner," and it is to be hoped in the interests of consistency that they will finally prevail. The matter is, of course, one of considerable practical importance in the Near East.

F. M. G.

Wakf in Egypt.—An interesting and somewhat acrid discussion has recently developed in the pages of *L'Égypte Contemporaine* between Mohamed Aly Pasha, formerly Minister of Wakfs, and Sheikh Mohamed Bekhit, formerly Grand Mufti, with reference to the notorious Islamic institution of Wakf. There can be little doubt that Family Wakfs, which constitute a sort of perpetual entail for the benefit of private families, are a source of many and grave economic and social evils in the Near East. Mohamed Aly Pasha is a promoter of reformation in this matter, and in order to clear the ground for reform he maintains that the institution of Wakf forms no part of the religion of Islam, and that the family Wakf is merely an abuse of the institution as it was originally contemplated. Whether he is right or wrong in this matter, it is not for a Western lawyer to determine, but he appears to have the support of Sh. Mohamed Rahim, Mufti of Syria. Sheikh Bekhit, of whose learning and high standing no one in Egypt needs to be convinced, adopts most strongly the contrary view. In a dignified and learned discourse, printed in the number of *l'Égypte Contemporaine* for May 1927, he sets forth the origin of the Wakf. He points out very forcibly that Islam not only prescribes men's obligations towards God, but prescribes by divine inspiration also men's obligations to one another and the rules of conduct by which they should be governed. Among these rules he finds the rules relating to Wakf. It is possible, he admits, that the institution may bring in its train economic and social evils, but we are not to argue that the existence of these evils necessarily condemns the institution, for this would bring condemnation upon very many institutions of admitted general benefit.

The Pasha returns to the charge in the November number of the *Journal*, and we learn that the Sheikh has published a bitter attack upon the Syrian Mufti in a pamphlet bearing the picturesque title, "The cutting swords of Yemen on the neck of him who attacks the lawfulness of Family Wakfs." We are reminded by the title of the controversial methods of the seventeenth century in England.

All who desire the prosperity of the Moslem lands in the Near East will hope that some method of reconciling the divergent views exemplified by those of the Pasha and of the Sheikh may be found, consistent with the limitation of Family Wakf as desired by the Pasha. The proposals put forward by him aim mainly at the limitation of the period during which a Family Wakf shall be permitted to immobilize the property. He suggests that it should not be allowed to subsist for beyond a fixed period or a fixed generation. The analogy of our own Rule against Perpetuities is obvious. He further suggests that upon the expiration

of the permitted period the capital should be divided between the beneficiaries proportionately to their shares in the revenues unless the original Settlement specified some other proportion. The Pasha might well be advised to study the English law of settlements of personalty before formulating a definite scheme.

F. M. G.

Statute Law Revision.—The passing of a Statute Law Revision Act last year by the Parliament of the United Kingdom was the usual preliminary to a fresh issue of Revised Statutes. The Act cut out the dead wood from the statute-book in respect of the period from 1900 to 1920; amongst the debris was a mass of temporary war-time legislation concerning such matters as the defence of the realm, military service and profiteering. Publication of official volumes containing only the living law of that period is the next step, and it is surprising to find that this form of activity has been suspended for as many as twenty years. Why has the twentieth century so poor a record in this respect? In the last thirty years the Parliament at Westminster has passed only three Statute Law Revision Acts; in the previous thirty years these Acts were so common that they were passed almost at the rate of one a year. From 1870 to 1900 a steady stream of Revised Statutes was pouring out, and no sooner was the last volume of the first edition completed in 1885 than work was at once begun upon an entirely new edition of which the first volumes appeared in 1888.

The existing (second) edition of Revised Statutes started with a solid group of sixteen volumes containing the living law passed by Parliament from its earliest beginnings down to the Jubilee of Queen Victoria. Our Society's late President, Sir Albert Gray, took the main part in this great task; among his surviving colleagues and coadjutors are Sir Arthur Thring (who bore witness to Sir Albert's work lately in our pages) and Sir Henry Theobald. In 1909 four fresh volumes were added under the experienced editorship of Mr. Alexander Pulling, who thus brought the edition down to the end of the Queen's reign. A further (and probably final) instalment of four volumes is now to be added; two are expected to appear before the end of 1928, the other two next year. These will carry the edition on to 1920, a date which, if not so striking a landmark as 1887 or 1900, is, at any rate, reasonably close to the important constitutional moment when separate legislatures were set up in the Irish Free State and in Northern Ireland. Naturally the system of adding at irregular intervals a succession of supplementary volumes to an edition which first began to appear forty years ago causes a certain incoherence to manifest itself between the earlier and later volumes. There is good reason to believe that a new (third) edition of Revised Statutes may be begun before very long. It is overdue.

The Schuster Library of Comparative Law.—Considerable progress has been made with the task of bringing the Library, as far as is feasible,

up to date. Owing to the kindness of Senator Marghieri, a number of treatises on Italian Law have been added to the collection, thus curing a deficiency which has existed hitherto. The current numbers of the *Juristische Wochenschrift*, the *Recueil Sirey*, and the *Giurisprudenza Italiana* are now available so that those who wish to be posted in the latest developments of Continental Law will find the material which they require. A complete set of the *Recueil Sirey* from 1791 onwards has been purchased, and it is also hoped to add a complete series of the *Giurisprudenza Italiana* at an early date. The Department of International Studies at the School of Economics are collaborating in the task of procuring the necessary bibliographical information which is required to maintain the Library in a state of practical efficiency. Many of the more valuable books have been rebound, and it is satisfactory to record that the authorities of the School of Economics are putting a very liberal interpretation on their responsibilities as custodians of the Library, and are doing their utmost to counter the reproach that treatises on foreign law are not available to readers in this country. In particular they are now considering the question of adding a section on South American Law to the Library, a development of the greatest importance in view of the close commercial relationships existing between this country and the Ibero-American Republics. It may be added that the Library is open to the general public, and every facility will be afforded to students and inquirers. Donations of books on Foreign Law and on the Law of the British Overseas Dominions will be received with gratitude.

Uniformity of Nomenclature.—From time to time the *Journal* has directed attention to the desirability of uniformity, not only in legislation, but also in the description of Acts. In the naming of Acts the Dominion legislatures oftentimes adopt a description which conveys the purpose of the Act more clearly than the title chosen at Westminster. Similarly officials doing the same work might be described by the same title. The fact that the Parliamentary Counsel is known as the Legislative Counsel in British Columbia rather baffled the omniscient printers' reader of a recent issue (see p. 46 of vol. x, part ii), but Parliamentary Draftsman, which is the description in some parts of the Empire, is probably more directly descriptive than either of the other titles.

Grants of Air-space.—If it was ever absolutely true in England that *cujus est solum ejus est usque ad cœlum* the owner's rights over the superincumbent air have been, as we all know, restricted by the Air Navigation Act, 1920.

But leases of air-space, or "air-rights" are rare with us, if indeed such cases have occurred. In the United States such cases are becoming not unusual. Mr. Silas H. Strawn of Chicago, the President of the American Bar Association, has given recently some interesting illustrations of cases where the surface is used by an owner or lessee for one purpose, while the air above a certain level is in another ownership

and devoted to another purpose. A conspicuous example is the Grand Central Terminal of the New York Central Railroad in New York. Another case is in Chicago, where Marshall, Field & Co. have leased the air-rights over a yard of the North-Western Railway. A warehouse costing many millions of dollars is to be erected on piers above the surface without interfering with the free use of its yard by the railway company.

Mr. Strawn suggests that we shall soon see air ports for the use of airplanes established on the top of such large warehouses.[1]

Uniform State Laws and State Rights.—Observers of American affairs know that the champions of state rights continue to fight what must often seem to be a losing battle. The Federal power has encroached more and more on the field which was at one time understood to be reserved to the State legislatures. In the United States the States have been growing weaker, while in Canada, curiously enough, the tendency has been the other way.[2]

Mr. Beck, a former Solicitor-General of the United States, in one of his lectures before the English Bar on the Constitution said: "Originally, the States were powerful political entities, and the central government a mere agent for certain specific purposes; but, in the development of the Constitution, the nation has naturally become of overshadowing importance, while the States have relatively steadily diminished in power and prestige."

Mr. Beck pointed out that the leaders of industry and commerce wanted legislation which was effective alike all over the country, and that their influence had been stronger than that of the farmers, miners and others who, broadly speaking, wanted Home Rule.

President Coolidge not long ago deprecated in strong terms the tendency towards diminution of state sovereignty.

The President said: "Unfortunately the Federal Government has strayed far afield from its legitimate business. It has trespassed upon fields where there should be no trespass. . . .

"The functions which the Congress are to discharge are not those of local government, but of national government. The greatest solicitude should be exercised to prevent any encroachment upon the rights of the States or their various political subdivisions. Local self-government is one of our most precious possessions. It is the greatest contributing factor to the stability, strength, liberty and progress of the nation. It ought not to be infringed by assault or undermined by purchase. It ought not to abdicate its power through weakness or resign its authority through failure. It does not at all follow that because abuses exist it is the concern of the federal government to attempt their reform."[3]

These considerations have an important bearing on the movement

[1] *Journal of the American Bar Association*, November 1927.

[2] See *Journal of Comparative Legislation*, Third Series, vol. ix, pt. iv, pp. 153 *et seq.*

[3] Cited in *Reports of American Bar Association*, 1926, p. 653.

to secure uniformity of law. The advance in this direction which has been made in the last generation is hardly realized in this country.

Meetings of Bar Associations are often regarded as occasions for spates of oratory rather than as means of bringing about legislative reform. But the American Bar Association succeeds in both. The movement for Uniform State Laws was largely due to its initiative when it appointed a committee in 1889, though the actual preparation of the laws was taken over by the National Conference of Commissioners on Uniform State Laws, an official body on which since 1912 every State has been represented.

Leaving out certain measures which for one reason or another have been dropped, the Conference during the thirty-five years of its existence has prepared forty-two Acts recommended for adoption. The extent to which the Acts have been adopted varies greatly in different States. One only, the Uniform Negotiable Instruments Act, has been adopted by all the States, and it is characteristic of South Carolina that this is the only uniform law which that State has adopted.

Wisconsin has the record, having adopted twenty-six Acts.

That the movement for uniformity is spreading there can be no doubt, but at the same time it is becoming more clear that there are dangers connected with it.

In the field of commercial law the arguments in favour of uniformity appear irresistible. Trade does not stop at State boundaries, and all the big commercial interests are concerned to get rid of diversities of law which are to them merely a nuisance. And, as business is controlled more and more by large trusts and combines which carry on their affairs in many States from a common centre, the more inconvenient does it become to have laws and regulations which vary from one State to another. In this field it is accordingly not surprising to find that already a considerable measure of uniformity has been gained.

The Commissioners represent 53 governments, *i.e.* 48 States and the District of Columbia, Alaska, Hawaii, Porto Rico and the Philippines. The Negotiable Instruments Act has been adopted in 52 jurisdictions, the Warehouse Receipts Act in 48, the Sales Act in 28, the Bills of Lading Act in 26, and it is entirely likely that the process will go on.

But there is more room for difference of opinion in regard to Acts dealing with real property or with social institutions. Here some leading American lawyers are sounding a note of warning, and among them are found members of the Conference itself. The President of the Conference, Mr. George B. Young of Vermont, in his address for 1926, points out clearly that the Acts which have met with wide approval have been those which deal with what may be called strictly legal matters, whereas the Acts dealing with social institutions have been on the whole coldly received by the States.[1]

And another member of the Conference, the Hon. James F. Ailshie,

[1] *Reports of American Bar Association*, 1926, p. 657.

has been strongly urging the same view. He points out that ideas of public policy are far from being uniform. "There are many subjects of legislation that are, to a large extent, local and upon which different States desire different laws. This necessity, or perhaps to speak more precisely, this demand is the outgrowth of a variety of causes peculiar to a locality or State such as climate, production and industry, habits and customs of the people, their political affiliations and religious attachments; from all of which has developed a so-called public policy of the State." [1]

Pan-American Code of International Private Law. — The 1927 volume of *Anales* of the Faculty of Juridical and Social Sciences of the University of La Plata continues the high standard of its initial year, 1926. Naturally most of the contents are concerned with the affairs and laws of the Republic; but some are of wider scope, such as the review of Dr. G. C. Salvador of the recent development of social insurance in France, which occupies about thirty-seven pages. However, the articles which most interest the readers of the *Journal* are those which treat of international questions, and of these we have three, two of which criticize the Pan-American Code of International Private Law, for which Dr. Bustamante has the chief credit, while the third rather objects to the whole plan as being too ambitious. This latter view is taken by Dr. C. A. Alcorta in "The historical school of law and the condition of international law," who quotes with evident approval the statements of Dr. Leopoldo Melo, when he said to the International Commission of Jurists at Rio de Janeiro in 1927 that facts will prevail over norms of conduct and the most lovely declarations will remain in the domain of theory until the arrival of obligatory international justice in public law, while in private law any compromise made in the face of scientific conviction will retard the advent of just ideals and human aspirations." Following Charles Hughes, he declared himself against the whole movement for treating pan-American international law as a thing apart.

Both Dr. A. Calandrelli and Dr. C. M. Vico contribute critical and most valuable commentaries on the above-mentioned code as amended at Rio in 1927, and it must be said that their observations are of an importance which will make it necessary to take them into serious consideration when the code is again discussed. It is superfluous to say that the greatest of all difficulties is that caused by the differing criteria of the personal law. To name some only—Argentina and Uruguay follow the law of the domicil, Brazil follows the national law, while Chile has a system which differs from both. The Central American States began and most still continue the theory of art. 3 of the French Civil Code. Mexico is pictured as intimately bound to the politics of the United States. Both of these eminent authorities seem to object to the scheme of the code in dividing laws into those of internal *droit public*,

[1] *Journal of American Bar Association*, 1927, p. 635.

international *ordre public* and those *d'ordre privé*, and this objection is sure to be upheld by the Anglo-Saxon States. It is unnecessary to refer to more detailed criticism at this stage, nor do we wish to depreciate in any degree the excellence of the code or of its distinguished authors.

WYNDHAM A. BEWES.

Administration of Justice Act, 1920. — It is officially announced that in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any parts of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislatures of Saskatchewan and Queensland have made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Ireland, and an Order in Council has accordingly been issued extending Part II of the Act to Saskatchewan and Queensland.

The operation of the Order in Council is confined to England, Scotland and Northern Ireland.

NOTICES OF BOOKS.

GREAT BRITAIN AND THE DOMINIONS.

It is gratifying that interest in the United States in the constitutional arrangements of the British Empire should be adequate to secure the inclusion in the series of Harris Foundation Lectures at the University of Chicago of this interesting and stimulating collection of views on the United Kingdom and the Dominions.[1] All the contributors have special claims to respectful consideration; Sir Cecil Hurst has been actively concerned with the legal issues arising from the development of Dominion autonomy; Mr. T. A. Smiddy is the first minister accredited to the United States by the Irish Free State; Mr. John W. Dafoe has long been a recognized exponent of Canadian national feeling; Sir William Harrison Moore is familiar to readers of the *Journal* as an authority on constitutional law, and more specially the law of the Commonwealth Constitution, while Messrs. E. H. Louw and A. S. Fletcher, who write on South Africa, prove themselves worthy collaborators. The New Zealand point of view in imperial and foreign affairs is admirably explained in a short paper by Mr. Condliffe, written after the Institute lectures had been delivered, which forms a much-needed reminder of the necessity of recognizing that each Dominion has a distinct standpoint from which it views these issues, and that no uniformity of action is possible.

It is naturally interesting to see how far the two high officials who write on the United Kingdom and on the Irish Free State are in agreement on the character of the relationship between the portions of the Empire. Sir C. Hurst is clear (pp. 50–55) that the relations are not equivalent to a personal union, while Mr. Smiddy seems (p. 117) to hold precisely the opposite point of view. The former bases his objection on the doctrine that "the common allegiance to the Crown prevents the relations between the different communities of the Empire from being international relations." But here a difficulty presents itself; it is clear law that the Hanoverians during the period when the Crown of Hanover was held by the British sovereigns were British subjects, and yet it cannot be suggested that the relations between Hanover and Great Britain were not international relations. It is in fact clear that, whether or not there is to be a development towards the position of a

[1] *Great Britain and the Dominions.* Chicago: University of Chicago Press, 1928. London: Cambridge University Press. Pp. x + 511. Price 15*s*.

mere personal union, the existing unity, which is conditioned by much more than the person of the King, is still far from being so dissolved as to permit the relations of the United Kingdom and the Dominions to be regulated by the ordinary principles of international law. It is clearly not a common allegiance which prevents the union being personal; it is the mass of understandings last summed up in the resolutions of the Imperial Conference of 1926 which constitute the British Empire a *persona sui generis* in the eyes of international law.

Sir C. Hurst repeats (p. 83) his doctrine that "the full power issued by the King authorizing a recipient to sign a treaty on behalf of any particular part of the Empire is issued on the advice of the Government responsible for that part." This dictum seems to be the source of considerable misunderstanding through its being taken in a literal sense. It appears to be thought in Canada at least that the issue of a full power follows directly on the recommendation of the Canadian Government by Order in Council. But it cannot be forgotten that a full power is issued under the great seal of the realm, and that the great seal is affixed to it under the authority of the royal sign-manual warrant, countersigned by the Secretary of State for Foreign Affairs. If the countersignature were omitted, then undoubtedly the Dominions and the United Kingdom would stand in a personal union, for the King would act direct on the advice of his Canadian ministers. But such a position for the King has not yet been approved by the British Government, nor indeed could any Government accord it without the sanction of Parliament, which would probably, if it felt inclined to make the change, hold that it would be far wiser to omit any personal action by the King, and confer the necessary authority to act on the Governor-General in each Dominion. If Canada were to remain neutral, under the system of a personal union, in a British war, it is manifestly desirable that the proclamation of neutrality should be issued direct by the Canadian Government, without inviting the personal assent of the King.

It is curious that there is general consent in regarding the Halibut Fisheries Treaty of 1923 (pp. 81, 115, 200, 244, 312) as of great importance in constitutional history, though the only deviation from practice was the omission of the signature of the British Ambassador at Washington, and the treaty was negotiated and ratified with the full knowledge and approval of the British Government. Far greater importance, when substance rather than form is considered, should be attached to Sir Wilfrid Laurier's famous reciprocity agreement with the United States in 1911. The subject matter of that agreement was of the highest economic and political importance; it was negotiated without any British control; and it would have been made effective without British approval, if the people of Canada had not rejected the Liberal Government's appeal to homologate its act; indeed in the opinion of many authorities it would have been approved by the Canadian Parliament had the Government forthwith pressed acceptance upon it. If credit

is to be accorded to anyone for establishing in effect the Dominion right to make treaties, it must be given to Sir W. Laurier. The new procedure adopted under the Imperial Conference resolutions of 1923 and 1926 is, however, more advantageous to the British Government and the Empire, for it enables it through the control of the issue of full powers to sign and of instruments of ratification to intervene to prevent the final conclusion, without consultation between the Dominions and the United Kingdom, of any treaty deemed likely to injure imperial interests. The modern procedure secures greater solidarity of Imperial action at the expense perhaps of some degree of Dominion autonomy.

There are some slips in historical matters, as is natural in lectures not fortified by annotations. Sir C. Hurst has forgotten (p. 10) that especially in Upper Canada, but also in Lower Canada the executive governments commanded considerable resources which enabled them to carry on, despite the desire of the legislatures to use the instrument of supply as a means of controlling policy. Nor did the British Government accept in 1839 (pp. 17, 65) the Durham report, which indeed Lord John Russell demonstrated to his own satisfaction to be quite impracticable of execution. The reference (p. 28) to a suggestion from "the responsible minister in Great Britain" in favour of organizing an Imperial Council is misleading; the proposal was made by the Colonial Secretary in Mr. Balfour's administration, and Lord Elgin made it clear at the Conference of 1907 that the British Government did not support it. Mr. Dafoe is too generous (p. 229) to the unlucky Simcoe in styling him Sir John and in making him Governor of Upper Canada; he would doubtless have been much more contented if he actually had had a really independent office. The services of Robert Baldwin to responsible government (p. 193) deserve recognition, but they do not obscure the superior importance of Durham's achievement in securing the necessary change of mind in the British Government which rendered the new system possible. Historically also it is far sounder to recognize that the actions of Sydenham and Metcalfe were almost necessary as a means of bridging the transition from autocratic to responsible government. Lord Elgin could hardly have succeeded as he did, had it not been that the struggles of the preceding years had rendered those concerned more familiar with the essentials of cabinet government. It was doubtless unlucky that Canada obtained the unattractive style of Dominion in lieu of Kingdom (p. 236), but, whether or not we accept the alleged dictum of Lord Beaconsfield crediting Lord Derby with living "in a region of perpetual funk," the fact remains that American feeling at the time was so bitter and Canada so defenceless that any irritation to the United States was to be avoided. Nor is it quite satisfactory to repeat (p. 239) Macdonald's graphic denunciations of the British delegates at Washington in 1871 without adding that the United Kingdom at the same time sacrificed her views on the *Alabama* claims rather than allow the continuance of strained relations with America, whence Canada might

easily have been the chief sufferer. An English fleet did not take possession of Cape Town in 1781 (p. 389), for Suffren forestalled Commodore Johnstone; the annexation of the Boer Republics took place in 1900, not 1902, and the Orange River Colony obtained responsible government in 1907, not 1906. More serious is the reference (p. 485) to Sir Bartle Frere's annexation of the Republics; this is unfair to the Orange Free State, which remained absolutely sovereign and independent from 1854 to 1900. It is surprising also to find Mr. Dafoe holding (p. 183) that no challenge was made in Great Britain to the right of the British Parliament to tax the American colonies; Pitt and Camden denied it vehemently, even when admitting the existence of a general legislative power. But these and some similar slips will doubtless disappear in any reissue of this interesting book.

A. Berriedale Keith.

POLITICAL SCIENCE AND GOVERNMENT.[1]

The United States puts this country to shame in regard to productivity in many departments; and in none more than in its output of books on Political Science. Professor Garner's primary purpose in the present work is to provide college and university students with an up-to-date textbook on political science and government. That purpose is adequately fulfilled. Professor Garner is a master of the literature of his subject and students will, therefore, find both his short bibliographies prefixed to each chapter and also his careful references of the greatest use.

The first part of the book is devoted to political theory: it deals with the nature, scope and methods of political science and its relations to such allied sciences as economics, law, sociology, biology, geology and so on; it analyses the nature, the constituent elements and attributes of the State; it points the distinction between State and Nation, and discusses the rights of nationalities; it deals with the problem of sovereignty, not neglecting the theory of limited sovereignty; it examines the different theories of the State, and in connexion with the forms and types of States discusses the difficult problem of classification; finally (as regards Part I), it indicates the different kinds of association and union between State and State.

Part II may be described as "applied" Politics. Here Professor Garner passes in brief review the actual types of government among the States of the modern world: cabinet and presidential government; Swiss democracy and the Soviet system of Russia, and then, after a discussion of the elements of strength and weakness in different forms of government, he devotes a chapter to the *province* of government. He concludes with chapters on the electorate, the legislature, the executive and the judiciary.

[1] *Political Science and Government.* By James Wilford Garner, Ph.D., LL.D., Professor of Political Science in the University of Illinois. American Book Company, 1928.

I do not pretend to have read the book through from cover to cover; but I have tested it at a good many points and it seems to me to be admirably adapted to fulfil its avowed purpose. What better can one say of a book? What more can one demand?

J. A. R. MARRIOTT.

THE CONSTITUTION OF NORTHERN IRELAND.[1]

THERE has hardly yet been time to forget the stages by which the Irish Home Rule legislation of 1914, postponed for the duration of the war, gave place to the Government of Ireland Act of 1920, the partition of the country and the duplication (for North and South) of the proposed new Irish institutions. It will be remembered that the political architects planned two wings (a northern and a southern) upon which they meant to balance certain central features to lend prospective unity to the design. Two years later the southern wing was cut away, bringing down with it the central structure. The story of the Act of 1920, now no longer operative in any part of Ireland except Northern Ireland, must seem to foreigners a characteristic instance of our national tendency towards improvization and compromise. Such as it is in its mutilated form, the Act of 1920 contains the Constitution of Northern Ireland. It has to be read with a body of "existing laws" full of references to the Lord-Lieutenant, the Chief Secretary, the Lord Chancellor of Ireland and many departments, grants and funds which are now no more. Though the genius of Sir Francis Greer spent itself upon a series of adaptations, there has been urgent need of elucidation. Fortunately the task has been placed in the hands most competent to perform it. No one can know the administrative complexities so intimately as Sir Arthur Quekett, the Parliamentary Draftsman to the Government of Northern Ireland; no one can expound with greater clearness or authority the effect of the governmental changes. He undertakes to issue later (as Part II) the actual text of the constitutional enactments, with annotations, a publication which will be invaluable to everyone engaged in administration in Northern Ireland. Meanwhile he has given us in Part I (*The Origin and Development of the Constitution*) a masterly introduction, accurate, straightforward and judicious. There is first a brief historical sketch of the ideas and proposals which led up to the 1920 Act and of the early steps taken when that Act was passed. Next comes an exposition of the present parliamentary system in Northern Ireland, the executive government, the transfer of services and the arrangements for finance and taxation. A particularly helpful feature at the end of the book is a set of alphabetical tables, one of which gives a key to all the Adaptation Orders in Council; another shows at a glance the Northern Ireland authority now substituted for the various former authorities of the United Kingdom or of Ireland; a third ex-

[1] Part I: *The Origin and Development of the Constitution.* By Sir Arthur Quekett, LL.D., K.C. Published by H.M. Stationery Office, Belfast, 1928. 3*s.* 6*d.*

plains the position of various funds which either have been wound up and apportioned or are now replaced by corresponding Northern Ireland arrangements. A chapter on constitutional developments subsequent to the passing of the 1920 Act will be found instructive. These developments, of course, are by no means yet at an end. The Parliament at Westminster has considerably enlarged the original limits placed on the legislative competence of the Parliament at Belfast. In 1925, for instance, three important matters (railways, fisheries and diseases of animals), initially intended to be administered by the Council of Ireland, were handed over. In the present year the Miscellaneous Provisions Act has diminished the awkwardness of a too rigid " reservation " of subjects. It is not easy to draw an exact line between what is " reserved " and what is " transferred." When the Act of 1920 declared the Supreme Court of Northern Ireland to be a " reserved " subject it can hardly have been intended that the Belfast Parliament should be precluded from legislating upon minor matters such as the summoning, attendance and qualifications of jurymen ; yet this point required a special explanatory statute a few years ago. " Reserved " features appear unexpectedly in subjects of law which at first sight seem wholly " transferred." Traces of this phenomenon are visible in the workmen's compensation legislation passed by Northern Ireland last year. The difficulty is there met with happy ingenuity and the result is one more example both of the skill of the Northern Ireland draftsman and of the goodwill and success with which the enactments of Northern Ireland are linked to those of the United Kingdom. To speculate upon future developments in the Constitution of Northern Ireland may be rash and futile, but time may well be spent in studying the present position as a concrete instance of the devolution of legislative and administrative functions. Although the setting up of separative governments for comparatively small areas may be uneconomic, there are Scottish and Welsh patriots who hope to see Parliaments sitting in Edinburgh and Cardiff—or whatever other cities may make good their claim to be national capitals. The congestion of business at Westminster and the need of decentralization may even lead to some greater measure of local autonomy for England, possibly based on a grouping of counties in the north, south, east and west. Remote as this prospect may be, if it should some day require serious consideration, examination of the working of the Northern Ireland Constitution will be profitable.

C. T. Carr.

THE COMMON LAW OF ENGLAND.

Lawyers on the Continent have, until comparatively recently, been content to regard the law of England as a nightmare, and so to dismiss it from consideration. For some time past, however, the fact has been stealing upon their consciousness that nearly a quarter, and that the most prosperous quarter, of the entire human race lives under this

amorphous system and its derivatives; and the result has been that an ever-increasing amount of attention has been given in Germany, Italy and France to the study of the Common Law of England—by no means excluding Equity.

In the interesting essay before us,[1] which is based upon a thesis presented for the doctorate of laws in the University of Paris, M. Ancel endeavours to explain why the law of England is so singularly different, in form and in spirit, from the systems, based upon Roman tradition, which prevail in other countries of old and advanced civilization—why, in short, from the continental standpoint, English law is so odd.

It is a not unprofitable exercise for us to endeavour for a moment to expatriate ourselves, and, standing beside M. Ancel, to look at his problem from his own point of view. To do so to the best advantage we must, in imagination, think ourselves into the position of a continental lawyer. In France, Italy, Germany, Belgium, in all the countries of the Western Continent from Sweden to Spain—and they are, it is to be remembered, in close and continual intellectual communication—the law is never allowed to stray far from the model of Euclid's elements. In these countries the study of the law is a philosophical study, its literature often eminently deserves to be so called, and the socially predominant branch of the legal profession is neither the judge nor the barrister, but the public teacher of law. Viewed from this standpoint, the conspicuous character of our English system, as exhibited either in this country and its dependencies, or in the United States, is its complexity.

No people has ever before developed or acquiesced in a national law anything like as intricate as ours. French law, for example, is certainly ten times as easy to understand, to advise upon, or to administer, as the law of England; and it would be a great error to suppose that this contrast is open to the simple explanation that French law offers fewer or less certain answers to the practical problems of life than does our own. There are, of course, many open or doubtful questions in French law; but not more than there are in English; while the amount of sheer learning necessary for the adequate equipment of the all-round practitioner is incomparably smaller. The explanation is that the French do not allow life to present so many questions: they are continually at work pruning their institutions; their tutelary genius is Procrustes; the vagaries of testators, the obstinacy of minorities, the ingenuity of lawyers are severely snubbed; and the legislator expects to be obeyed, in the spirit as well as in the letter.

And what is true of France in this respect is, broadly speaking, true of the rest of Europe. To the study of this problem in social psychology M. Ancel brings much learning and a due measure of respect. He divides his monograph into three parts: *Aperçu historique, Le système juridique*

[1] *La "Common Law" d'Angleterre.* Par Marc Ancel, *Docteur en Droit.* Paris: Rousseau. 25 frs.

and *la portée du système*—the latter dealing with the "expansion of the Common Law."

In the historical section M. Ancel traces the specific features of our law first to a compromise between feudalism and, what was unique in the Middle Ages, the supremacy of English royal justice; secondly to the writ; and thirdly to the jury. At a later stage, the common lawyers having established for themselves a measure of conservative independence, the King finds it necessary, through his Chancellor, to send an expeditionary force to correct the errors of his quasi-autonomous province; but, as usual in England, there is no fight to a finish, and Law and Equity come to a compromise. Similarly, in modern times, when the instrument of innovating justice is found pre-eminently in the Act of Parliament, the legislator is always deferential to, and eager to compromise with, the traditional law preserved in the practice of the Courts.

It is in the second part of his book that M. Ancel comes nearest to grappling with his central problem, which is to find psychological reasons for the idiosyncrasies of the Common Law. Of these he propounds four. The English national attachment to tradition; the demand for certainty; the dislike of the arbitrary; and the creed of the supremacy of the law. We venture to doubt whether these causes go as near to the root of the matter as M. Ancel supposes. They were at least equally true of the Romans, but did not produce in Rome effects similar to those which they have produced with us.[1] And it must be remembered that the phenomenon to be explained is far from consisting solely in the prætorian magistracy with which our judges are invested, in the authority attached to their *responsa*, or in the system of dialectic by which judicial decisions are elaborated. The spirit of our law displays itself with equal singularity in the Statute-book.

We submit for the consideration of the foreign student of our institutions the following line of reflection. It may be said, in no spirit of irony, that the law of England is an isolated but vigorous survival of the authentic spirit of the Middle Ages. Those ages were far from being dark; they were extraordinarily full of mental energy; but they pursued different objects from us, and in a different spirit. For them the sense of the sacramental and the sacred penetrated all parts of life, as for us does the sense of the humane, the convenient, and the utilitarian. To enter the domain of the Common Law, like going into the Temple Church, is to pass into the atmosphere of a faith which is assured that the great interests of mankind can no more safely be entrusted to logicians than they can to politicians. It is the best mind of the twelfth century, concerned to fight anarchy with the weapons of a mystical

[1] It may, however, be admitted that if, in the time of Augustus, some Greek had invented paper and the art of printing, the *corpus juris* might not impossibly have grown, in the course of time, to dimensions comparable to those of a modern law library.

logic, which still in our law protests against secularism and rationalism. Three things have enabled the spirit of the age when Europe was in the making to survive in the law of England to the present day. The first is the centralization of the law at the capital of that uniquely powerful institution, the Crown of England. The second is the absorption of the energies of our ancestors in the sixteenth and seventeenth centuries in matters of religion. And the third is the Bar ; the last a social factor, the importance of which M. Ancel is, perhaps excusably, far from apprehending. It is in the corporate bosom of this ancient and remarkable society, so august, powerful and disciplined, rather than in the hearts of the people of England, that the Common Law is preserved and enshrined. Indeed, the last time that any considerable body of laymen expressed their collective views on the law was on August 12, 1652, when Commissary-General Whalley, supported by a deputation of officers of the Commonwealth Army, presented a petition at the bar of the House praying that " a speedy and effectual course might be taken for the regulation of the law."

In conclusion we congratulate M. Ancel on his gallant effort to bridge the abyss of the English Channel, and we hope that his essay may find a translator.

M. S. A.

THE LEGAL SYSTEM OF ENGLAND.[1]

Professor Lévy-Ullmann has followed up the first publication in this series (*La définition du droit*) with a second work on the legal system of England, the first volume of which is now before us. It deals in effect with the history of English law. But that bald description of it would be unfair to the learned author unless we add to it the exact objects which he has set forth in his very attractive Preface. That Preface, for its noble profession of faith, ought to be read by everyone interested in Comparative Law. In the first place, he points out that he had to reckon with readers not in the least likely to be so familiar with the English system as students on this side of the Channel or on the other side of the Atlantic. Secondly, he has kept before him a higher aim than the mere production of a French book on English legal history, and that is to study not merely the sources of our law, but *le système juridique de l'Angleterre, c'est-à-dire l'agencement de ces sources. Et notre étude s'inspire, avant tout, de l'esprit comparatif.* A sufficiently hard task! But who that knows Professor Lévy-Ullmann and his distinguished achievements in Comparative Law can think of anyone better fitted to accomplish it? Six leading differences between English and European law (and particularly French law) are then detailed, and the English Common Law, Statutes and Equity are to be investigated in such a way

[1] *Éléments d'Introduction générale à l'étude des sciences juridiques, II. Le système juridique de l'Angleterre. Tome premier. Le système traditionnel.* Henri Lévy-Ullmann. 1928. 574 pp. Librairie du Recueil Sirey. Paris. 50 francs.

as to show how these points of departure from the European systems originated. The first volume consists mainly of English legal history and the comparative side of it is to be developed in a later part. Let it be said at once that the author has so far accomplished a striking success. His polished style (if he will pardon a foreigner the impertinence) and notable courtesy would alone make the book fascinating, and these gifts of expression adorn a substance of accuracy and learning which render it a solid contribution to legal literature. French lawyers have here a history of English law which is full enough for practical purposes without further recourse to English books on the topic. French researchers in English legal history are not, of course, absolved from the duty of consulting the English sources, but they are to be felicitated on an excellent bibliographical guide in their own language to our system. The author has freely used standard works on English legal history, but he has faithfully acknowledged his debts and his own originality has added to the borrowed talents enough to give many new ideas even to English experts. We concur in his opinion that a mere rendering into French of some selected English book would have been unsatisfactory. The question would at once have arisen, " Which book ? " And a still stronger objection would have been that no simple translation could have completely answered the requirements of a continental reader. Professor Lévy-Ullmann had the advantage of knowledge of both systems and this gives pre-eminent importance to his book. What English writer has attempted the converse task of compiling a modern history of any continental body of law ? True, we have the admirable translations of various foreign works of this sort in the Continental Legal History series ; but they are no more than translations or adaptations, and in this respect there is still a gap in our legal literature, though we have scholars here and now competent to fill it. A single practical example of the superior position which familiarity with both systems of law has given Professor Lévy-Ullmann may be cited in his timely warning of the disparate meanings of " corporation " in the two languages.

Some typographical errors were almost inevitable in such a work, but they are much fewer than one would expect, and on points of substance such mistakes as we have detected are nearly all trivial. We cannot accede with any heartiness to the description of the recent land legislation as codification in the proper sense of that word (p. 44), and to say that the older a rule is the more weight it carries is to put the matter too strongly for some branches of the law. On p. 157 it is said that the Act of Settlement, 1700, provided that the judges could not be removed except upon an address to the Crown by both Houses of Parliament. But the Act itself by using the words, *quamdiu se bene gesserint*, implies that as regards the Crown the judges also hold office during good behaviour, and that, even in the absence of an address by both Houses, the Crown can remove them for official misconduct. The Supreme Court of Judicature Act, 1875, s. 5, enacts that judges of the High Court and

of the Court of Appeal (except the Lord Chancellor) shall hold office during good behaviour, subject to a power of removal by the Crown on address by both Houses of Parliament. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 12, re-enacts this. But neither these nor any other Acts have repealed the clause in the Act of Settlement, and, as we have urged elsewhere, the above interpretation of it appears to hold good. But Professor Lévy-Ullmann may well be excused for adopting the narrower meaning, for that is what is generally stated in the text-books (with the notable exceptions of Anson and Holdsworth), and even so reliable a compilation as Halsbury's *Laws of England* contradicts itself on the point (*cf.* vol. vii, s. 24, and vol. ix, s. 132).

We are loath, however, to imperil the balance of this review by pressing the *minutiæ* of criticism, for the book is such a landmark in Comparative Law and has done such a great service to its author's fellow-workers that, on a broad view of it, praise may well remain unqualified.

P. H. W.

THE ANGORA REFORM.[1]

Under the above title Count Ostrorog, who was formerly Judicial Adviser to the Ottoman Government and till 1927 Lecturer in Mohammedan Public Law and Turkish Land Law in the University of London, has published three lectures delivered by him at the centenary celebrations of University College. The publication is opportune in view of the fact that on April 10 last the National Assembly voted the abrogation of Art. II of the Constitution of 1923, thereby disestablishing Islâm which till then had been the State religion. This was done by a unanimous vote as usual, in spite of the declaration contained in the Constitution that the principles and rights therein defined are final and that no amendment tending to alter them may even be discussed.

This further " reform " at Angora may serve again to call the attention of those interested in comparative law to the amazing legal revolution by which Mohammedan law in Turkey, where the Orthodox Caliph held sway from the days of Selim till 1924, when Abdul Meguid Effendi was deprived of the title and went into exile, was replaced by a modern European Code. Count Léon Ostrorog is to be congratulated on the publication of these interesting lectures, which merit a wider publicity than they could obtain by delivery. His matter is full of interest and sufficiently simply expounded in spite of the learning on which it is based. His first lecture deals with the past—Mohammedan Law. He calls the lecture the " Roots of the Law," *Usulu'l Figh*, or Philosophy of Law, and he explains how the development of Mohammedan law to fit modern conditions was rendered difficult by the original conception of the Divine Law having a single source—the Koran—and how it became impossible after the closing of the door of " interpreta-

[1] *The Angora Reform.* By Count Léon Ostrorog, LL.D. University of London Press. 4*s.* 6*d.* net.

tion" to render Mohammedan law sufficiently elastic to make the compromise which was essential if the law of an Arab tribe of the seventh century was to be a living force in a country brought into contact and competition with modern civilization. The second lecture explains how the Ottoman Government had, to a certain extent, solved the difficulty and lays stress on the difference between the Turkish and the Arab outlook. Turkish psychology is very different from that of the Arab, discipline being the main characteristic of the Ottoman character. Their belief in the authority of the Sultan enabled them to conceive of a man-made law distinct from the divine law. The Turk adopted Islâm but managed gradually to modernize Mohammedan law (though very imperfectly) so as to make it fit in with their political position in relation to European Powers.

As Count Ostrorog points out, the Ottoman was very tolerant—far more so than the Christian in the East and more than the Western Christian was in the days of Mohammed the Conqueror or Suleiman the Law-giver. One of the consequences of his tolerance was the familiar institution of the Capitulations under which foreigners to a large extent applied their own law in their own Courts within the limits of the Ottoman Empire. What is perhaps less well known is that the *rayah*—the native Christian and Jew—also had his own religious law applied and in his own religious Courts in matters (broadly speaking) of *statut personnel*. It is an error to suppose that all the concessions made to foreigners and Christian native subjects were dictated by foreign Powers. They were a logical result of the religious and personal character of law: law in the East was personal and not territorial. In the Ottoman Empire the *qanûm*—man-made law—found its place side by side with the divine Sharia (Sher' seems a little pedantic, and perhaps if the usual English form is abandoned Shar' would be more correct) at first only with the approval of the Ulema, but later the *qanûm* was often in direct opposition to the sacred law—so much so that a separate set of Courts had to be established to apply the *qanûm* as the Kadis would not apply any other law than the Sharia. Thus haltingly and with difficulty the Ottoman Government kept pace with modern requirements—at least the façade was there though it concealed very untidy slums. Whether it would have been possible to continue development on these lines is very doubtful, but until the war was over there was no thought of doing otherwise; the revolution of 1908 made no change in the principles of the law.

It is a different story with the revolution which started after the signature of the Treaty of Lausanne. Three months after the treaty Turkey became a republic; four months later the Caliphate was abolished; lay courts were established instead of the Mehkemehs and education was laicized in 1924; the dervishes and tekiehs were abolished in 1925. Still Mohammedan law applied till 1926, when a Turkish Civil Code was promulgated which to all intents and purposes is a literal

translation of the *Code civil suisse*. From that time Mohammedan private law, including family law, wills, inheritance, etc., has gone and been replaced by European law. Count Ostrorog rightly stresses the importance of the legal revolution which has resulted in Moslem family life now that women have not only property rights which were always recognized by Moslem Law but *equal* rights in inheritance, marriage and divorce hitherto denied them. One interesting feature is not alluded to, *i.e.* the change made in the law relating to real property. Book IV of the Swiss Code which deals with "la propriété foncière, la propriété mobilière et les autres droits réels" presumably abrogates the Sharia, the Medjelle and the Turkish Land Code of 1858 which formerly regulated Wakf, Mulk and Miry Land. The distinction between "Miry" and "Mulk" has disappeared and the Swiss Code contains no provisions dealing with the constitution of Wakf! There appears to be no transitory legislation to facilitate the change in land tenure, and a holder of "Miry" land or an "ijaratein" tenant might if he thought about it be somewhat puzzled as to his legal rights. The disappearance of Wakf would mean the loss of a useful institution, largely corresponding to an English trust, unknown to continental jurists. In the case of existing Wakfs it would be difficult to say who would become owner of the land, as the *mutwally* is only manager, and the beneficiaries are only entitled to the revenues, the *rakoba* being vested in Allah. Then *hypothèque* hitherto unknown in Moslem law becomes a Turkish institution, and the *tapu* office will presumably develop into a *bureau des hypothèques*. The difficulty will be to make the Anatolian peasant, who is a sincere Mohammedan, understand the change which has taken place, and lawyers should have a rich harvest. Possibly to some extent the change will be, as it has so often been in the past, more of a paper alteration than one which corresponds with facts.

Count Ostrorog asks, in conclusion, "What remains of Islâm in Turkey?" At the time of his lectures, Islâm was still the State religion and he emphasizes the point that *then* Republican Turkey was so far from advocating repudiation of Islâm or official atheism that the Moslem religion was confirmed as the State religion. He tries to suggest that though Islâm does not countenance a divorce of religion and law, the legal revolution may prove to be the beginning of a reform of Mohammedan law—a "return to an Islâm of younger and broader views"—a new conception of Islâm uncorrupted by the "subtlety of scholastic logicians." He goes on to put forward the idea that the Turkish reformers "only purposed to organize the things of this lower world according to the standards of modern civilization," but at the same time most solemnly asserted that Islâm is the State religion of Turkey. The laicization of law in Turkey may thus be a starting-point for an important renewal of Islamic thought on a more liberal basis than was possible before. Unfortunately the recent decision to abrogate Art. II of the Constitution hardly gives much hope for the view that by more liberal

interpretation Moslem law may still be a force in that part of the East. Mohammedan law has been abolished and there is no State religion. Mohammedan law may be restored, but it is impossible to develop an enlightened Moslem jurisprudence with the Swiss Civil Code blocking the path. To the true Moslem religion and law are one and the law of the land is the law of religion. It might be possible to obey man-made law and still be a true Muslim, if the man-made law dealt with indifferent matters, but the family law and the law regulating the private life of the faithful believer has been replaced by modern European legislation which it is impossible to harmonize with the Sharia.

Count Ostrorog's little book is thoroughly to be recommended to those who are curious as to what the change implies. His command of English is admirable though there are a few foreign turns of phrase which look like gallicisms, *e.g.* his use of " since " instead of " for "—" since fourteen centuries " (p. 14), or " since many generations " (p. 62). We do not speak of " formal logics," but " formal logic " (p. 30); " graphical " for " graphic " (p. 32) is a rare usage. One cannot " assume that . . . " in the sense of " affirm that " (p. 37); the " most achieved " picture seems to suggest that " achevé " was the original word in mind. These small slips and other little turns of phrase are only slight blemishes on a lucid style in English which few foreigners achieve.

W. H. Hill.

AMERICAN FOREIGN POLICIES.[1]

Only an American could have written this book, for it is a trenchant, outspoken, almost daring criticism of American foreign policies, and yet is based on wide and detailed knowledge and upon deep understanding of the history and present condition of the United States. It is beautifully written, in an interesting, dignified style, and is informed throughout with lofty principles and sane outlook.

Professor Garner at the outset states, as the only two possible alternatives for the United States, Co-operation or Isolation. He believes that any course midway between these two alternative courses is not in the long run practicable. Yet, in his view, since the end of the Great War the United States has endeavoured to avoid both complete co-operation and complete isolation; accordingly Professor Garner is inclined to hold with some other American publicists that the United States has had " no foreign policy since 1920." He admits the binding force of tradition in the historical policies of America, almost amounting to superstitious veneration; but he contends that conditions have so entirely changed since the days of Washington and Jefferson that those masters themselves might be surprised at the current application of their *dicta*. For the origin of Washington's policy of isolation was,

[1] *American Foreign Policies.* By James Wilford Garner. New York University Press, 1928. Pp. viii + 264.

says Professor Garner, apprehension of the possible loss of American independence; but no such apprehension can possibly exist now.

In the same way the author severely criticizes certain modern applications of the Monroe doctrine. The invoking of the doctrine in the case of Great Britain's boundary dispute with Venezuela was, according to Professor Garner, absurd; and the British Government's forbearing attitude during this episode constitutes, he thinks, a lasting debt of the United States and the world to Great Britain.

Professor Garner produces an elaborate array of facts to prove that the recent isolation policy of the United States is really a departure from a co-operation policy in the previous sixty years. He does not deny that since the War the United States have done some fruitful international work—we have, he says, refused the League of Nations but have *co-operated in public health*. The War Period emerges as "the heroic age of American idealism."

No praise can be too high in respect of the ability with which a multitude of instances is marshalled in this book, and of the grace and lucidity with which general principles are explained and incisive criticisms made.

R. B. Mowat.

NATIONAL POLICY AND NAVAL STRENGTH.[1]

The first requirement of men and nations is security—security to live their lives, practise their industries, and keep their property without exposure to the danger of interference or expropriation by neighbours or enemies. In our own municipal life this security is attained by the Reign of Law, and the whole world is earnestly hoping that by some means, either by the World Court at The Hague, by arbitration, or by mediation or conciliation, the Reign of Law will replace the Rule of Force in international relationships. And this is not a new desire. For every great European war has been followed by a general repugnance to war, and this repugnance has caused a general search for security against war, or at all events against the causes of war and the consequences of war. In the case of the Napoleonic wars their origin was clearly traceable to the French Revolution and all wars strengthen the revolutionary element in every nation. For war is itself revolution. Law and morality are placed in cold storage "for the duration," and it is not always easy to take them out of their hiding-place or to replace them in the same condition as they occupied at the time of the opening of hostilities. So at the conclusion of the Napoleonic wars the aristocratic Governments of Europe formed a Holy Alliance by which they undertook to be guided by Christian principles in international affairs and quite naturally these principles as understood by them required the suppression of all liberalizing or revolutionary movements. It seemed

[1] *National Policy and Naval Strength, and Other Essays.* By Vice-Admiral Sir H. W. Richmond, K.C.B. London: Longmans, Green & Co., Ltd. Pp. xvii + 356. Price 16*s.* net.

to them that peace and security for the nations could best be attained by a resistance to all movements for change, and this was a very natural inference under the circumstances.

But there have been other means by which nations have sought security, such as foreign alliances, large standing armies or fortified frontiers. The British nation has consistently sought security in Sea Power. Vice-Admiral Sir Herbert Richmond, in his *National Policy and Naval Strength*, has followed in the footsteps of Sir Walter Raleigh and Admiral Mahan in teaching the Anglo-Saxon nations on both sides of the Atlantic how that security can be maintained. He asks: "What is England's interest? Security. In what manner can her security be lost?" Then, quoting Sir Walter Raleigh, he says: "There are two ways in which England may be afflicted. The one by invasion, being put to the defensive, in which case we shall cast lots for our own garments. The other by impeachment of our trades, by which trades all commonwealths flourish and are enriched."

Nothing has happened since the death of Sir Walter Raleigh that can impair or discredit this opinion. The ocean may be likened to a vast common with roads and paths crossing it and all leading to houses or factories or shops, and whilst it is important to every nation to have a right of way over these trade routes, to no nation is that right of way so important as it is to England. For her life and the lives of her children depend on the food that passes over those trade routes.

We see, therefore, that Sea Power, that is to say, the right of way over the ocean pathways, has been a governing factor in English policy for centuries and has influenced our continental relations. The independence of Holland and Belgium has been a cardinal principle of English policy for four centuries. Why? Admiral Richmond turns to Raleigh for an answer, and Raleigh, putting aside all questions of religious or racial or political sympathy with the Dutch and basing his conclusions solely on the British need for maritime security, says: "I hope I shall never live to see the day when the French shall be masters of the Netherlands upon any conditions." From Raleigh to the French declaration of war on England and Holland on February 1, 1793, and from 1793 to August 4, 1914, are long stretches of history, but the same motive, security by sea power, runs through the whole of our continental policy like a single thread. In his lecture on National Policy and Naval Strength and in his lecture on Combined Strategy the Admiral shows the use and misuse of Sea Power in war and its influence on policy, but his chapters on "Sea Power in the War with Germany" and "Consideration of the War at Sea" will be found the most interesting and instructive by those who are considering the problems of to-day.

The question of German Naval Strategy need not detain us. Admiral Richmond discusses with an admirable impartiality the arguments for and against the German decision to avoid a decisive action with the Grand Fleet until the British Naval Forces had been reduced to some-

thing approaching parity by the action of mines, submarines or other casualties. His chapters will be found most instructive by students of naval strategy on both sides of the Atlantic, but it will be sufficient to summarize the controversy by saying that it was a conflict between the advocates of decisive action and the supporters of the theory of a Fleet in Being.

Admiral Jellicoe was the only man in Europe who could lose the war in a single day, and the margin of superiority of the British Fleet was smaller at the commencement of the war than it was later; a victory over the British Fleet would have put a stop to British and Colonial military operations in France and would have reduced England to starvation in a few months. A German defeat, on the other hand, would have released a quarter of a million men detained in England to protect the country against invasion and would have added that number to the British armies in France. Would the great gain which would have rewarded a victory have justified the Germans in running the risk of a defeat—that is to say, the command of the sea and the interruption of British communication with France? This is a question not to be answered by rhetorical comparisons to digging rats out of a hole, but by the sober balancing of arguments for and against.

Quintus Silo, finding himself unable to tempt the Roman general Marius out of his entrenchments, cried out: "If you are a great general, Marius, come out and fight a battle." To this Marius replied: "If you are one, make me do it." This is a sufficient answer to the rat-in-a-hole imputation, but it does not decide the question of German strategy. Admiral Richmond seems to give judgment in favour of Tirpitz's advocacy of decisive action—that is, of risking battle against superior force, and we must leave the matter there.

But the question of the use of Sea Power for the interruption of commerce and especially the commerce of neutrals is a matter of immediate interest and one that must engage the attention of international jurists and politicians for some time to come. It is important, therefore, that we should get the events of the Great War in proper focus, and for this purpose Admiral Richmond is an invaluable guide. It is usually assumed that Germany was blockaded by England and the British Fleet. This is not the fact. Strictly speaking there was no blockade. But the Central Powers were in effect isolated and cut off from communication with the outside world by land and sea. When Italy and Greece entered the war there was what amounted to a siege of the Central Powers from the North Sea to the Ægean, whilst the Russian armies and the operation of the doctrine of continuous voyage and rationing established the equivalent of a blockade by neutral countries. If England had been without allies the blockade of Germany would have been impossible, whatever the strength of the fleet. Nor could that blockade, such as it was, be considered complete until the United States intervened. For the use of Sea Power is necessarily limited by the need for con-

ciliating neutrals. Neutral industries and neutral commerce profit enormously by a great war between rich nations, and there can be no dispute of the fact that those profits would be greatly increased if the neutral was free to supply all belligerents with everything they were willing to pay for. The history of both England and the United States shows that their views on the right of capture have varied as they were neutrals or belligerents. Neither nation has been consistent, nor has American opinion been unanimous. As evidence we may be allowed to supplement Admiral Richmond's admirable summary by a few quotations from two eminent Americans.

Maritime capture, in the words of Mr. Dana, "takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance."

Admiral Mahan made the same point when he wrote: "The capture of an enemy's property at sea, when in process of commercial exchange, is a weapon of offensive war. The effects are unusually searching and extensive, because distributed over the whole belligerent community; yet they are also among the most humane, because they act by loss of property while entailing little bloodshed." And in another place Admiral Mahan says: "From decade to decade experience shifts like a weathercock; the statesman mounted upon it becomes a Mr. Facing-both-ways. The denial of commercial blockade, the American national expediency of 1800, suggested by such eminent jurists as John Marshall and James Madison, would have been ruinous manacles to the nation of 1861–5."

We may assume, therefore, that the expediency and humanity of the right of maritime capture as a means of coercion has many supporters amongst students of naval war, but the use of that power is limited and Admiral Richmond states the limitation clearly and unanswerably when he says:

> While, therefore, in virtue of our exceptionally situated Empire, scattered over the world and connected by the oceans, our interests at sea stand in a different category from those of any other Power, at the same time our capacity to subdue an enemy by means of our navy is limited, because directly we begin to apply it in full measure we risk the danger of throwing neutrals into the scale against us. The armed coalitions of the past and the example of Germany to-day are sufficient to show this. It is only when we are allied with military and naval Powers, who can close the land frontiers, shut their own harbours to enemy trade, and contribute such strength that the remaining neutrals cannot oppose the measures of control adopted, that we can produce the result seen to-day. Such a position infers agreement on the part of those other Powers that our cause is just; and in such a case, other nations not only have nothing to fear from a British Empire strong at sea, but even reason to be glad of the assistance which such an Empire can bring in case of dispute. (Page 142.)

We will not follow the Admiral in his discussion of the co-operation of the Land and Sea Forces or in the questions of administration; these

matters are clearly and convincingly set forth in most instructive chapters which should be read carefully by every soldier, sailor and politician, but we cannot deny ourselves one more quotation. The Admiral tells us :

"When nations go to war, peace is the object. A lasting peace—and no other is worth calling by the name—is only brought about by a victory so complete and terms so moderate and just that there is no chance of a resuscitation of the quarrel." Thank you, Admiral. You have shown us the way to a peace of reconciliation and the way to security. Let politicians and journalists take note.

For these are not the words of a Pacifist or a Defeatist, but the considered opinion of the President of the College of Imperial Defence, and a Vice-Admiral in the British Navy who knows and teaches the lessons of war and peace. He has written a most valuable book which will be studied with interest and profit by soldiers and sailors in England and America.

GRAHAM BOWER.

A FRENCH BIBLIOGRAPHY.[1]

MONSIEUR GRANDIN has rendered an enormous service to students of the French law. His book will be of great use to practising lawyers in France, and it will be indispensable to professors and others who are engaged in researches in law or economics. In many countries outside France it is certain to be widely used and it will do much to facilitate the study of the French law abroad. No library of French law can do without it.

It is the fruit of years of labour and some idea of its scale may be conveyed by saying that the two volumes without the supplement contain references to more than 64,000 publications. The bibliography comprises all works published in France, and also works published abroad in the French language, so that as regards Belgium and French Switzerland it is almost as complete a bibliography as it is for France itself. It covers not only separate books but also articles in reviews and periodicals, and, what is extremely important, all the *thèses de doctorat* in these subjects. All students know the difficulty of hunting up articles scattered over numerous periodicals, and if the bibliography contained nothing but this it would be enough to entitle its author to our warmest gratitude. The best indication of its scope is to give the list of subjects.

Tome I : Enseignement du droit.—Philosophie et méthodologie du droit.—Droit romain.—Histoire des droits autres que le droit romain.—Jurisprudence générale.—Journaux et Revues générales de droit.—Repertoires généraux de droit.—Codes réunis et Recueils de lois.—Droit usuel.—Législation de la guerre.—Droit civil.—Procédure civil et com-

[1] *Bibliographie Générale des Sciences Juridiques, Politiques, Économiques et Sociales, de* 1800 *à* 1925–1926. Par A. Grandin. Paris : Sirey. Price 300 francs, avec supplément 1926 et 1927. 30 francs.

merciale.—Officiers ministériels.—Droit commercial.—Droit pénal.—Médecine.—Pharmacie.—Substances vénéneuses.—Droit rural et forestier.—Droit administratif.—Droit public et droit constitutionnel.—Questions de politique intérieure.

Tome II : Armée.—Marine.—Assistance publique et privée.—Hygiène publique et privée.—Pensions.—Législation ouvrière.—Épargne.—Mutualité.—Prévoyance.—Droit international privé.—Droit pénal international.—Droit international public et questions de politique internationale.—Alsace et Lorraine.—Colonies françaises.—Étranger (classement par pays, avec des sub-divisions pour chaque pays).—Finances et impôts.—Économic politique.—Sociologie.

Tome III : Table alphabétique par ordre de matières.—Table alphabétique par noms d'auteurs, des anonymes et des publications périodiques.

The work will be kept up to date by the publication of an annual supplement.

A similar work for English law is badly needed.

F. P. W.

COMMENTARIES ON COLONIAL AND FOREIGN LAWS.[1]

With the publication of this part the new edition is completed. Mr. Wyndham Bewes is to be congratulated on having brought to a conclusion a particularly arduous task.

The first volume of the new edition of "Burge" appeared in 1907, and by 1914 volumes 1, 2, 3 and 4 (Part I) had been published. The war, as was natural in the circumstances, suspended further operations.

After its conclusion neither of the two general editors was able to go on with the work. Sir Alexander Wood Renton was called away by a succession of official appointments, and Mr. George Phillimore for some years before his lamented death in 1926 was prevented from finishing a task to which he had devoted a vast amount of labour and learning.

For this concluding part of the work which forms in itself a stout volume Mr. Wyndham Bewes is entirely responsible.

To edit a book of this kind is peculiarly difficult. The contributors are scattered about in many countries whose legislation is continually changing and their contributions have to be fitted together and presented with due regard to proportion.

A work covering so wide a field and dealing with so many systems of law it is impossible to review in the ordinary way. Its value can be tested only by use. But the reputation of the editors and of the contributors in different countries gives every ground for believing that the work has been well done and that the new edition presents a correct

[1] Burge's *Commentaries on Colonial and Foreign Laws*, new ed., vol. iv, part ii. London : Sweet & Maxwell. Pp. 694. Price £2 (the set, £10).

synopsis of these different legal systems as they were at the time of writing. Though it is called a new edition of "Burge" it is in reality a new work.

Few books have had so curious a history. The original work was published in 1838 and was, of course, in great part obsolete in 1907 when vol. i of the new edition appeared.

The original work was produced by a single author who took the whole world for his province. It is simply astounding that a barrister over fifty with a considerable practice should have sat down calmly "to bring together those several systems of colonial and foreign jurisprudence which constitute a considerable part of the law administered by the supreme appellate tribunal of the British Colonial Empire, and which are frequently the subjects of judicial consideration by the other tribunals of this country." He takes within his purview "(1) the Civil Law, the great source from which every other code has largely borrowed; (2) the law of Holland as it existed before the promulgation of the Code Civil; (3) the law of Spain; (4) and (5) the Coûtumes of Paris and Normandy; (6) the present law of France; (7) the law of Scotland; (8) the law of England; (9) the local laws of the Colonies in the West Indies and North America; (10) the laws of the United States of America."

And, as if this were not enough for one man, he found it necessary to include in his scope the whole subject of conflict of laws, which was when he wrote in a very vague condition.

And yet, speaking broadly, the work was well done and the book had a high reputation.

To recast the book in its present shape it has been necessary to call in aid a band of learned contributors in various countries who have had to take account of the mass of statute law and of judicial decisions since 1838. There is no other work which covers the same field as "Burge," and this new edition will be welcomed by the profession both in England and abroad.

F. P. W.

A HANDBOOK FOR DRAFTSMEN.[1]

When Sir Alison Russell first published his admirable handbook *Legislative and Other Forms*, it received a warm welcome in these columns. The book was adopted in many colonies and protectorates and quickly proved its worth to practitioners and officials. The second edition, containing three times as many forms as its predecessor, is assured of a not less cordial reception. Though it is designed mainly for colonial use, the general suggestions about drafting, brought together in a new introductory chapter, will be found helpful and sound by draftsmen at

[1] *Legislative and Other Forms.* By Sir Alison Russell, K.C., Chief Justice of Tanganyika Territory. Second Edition, 1928. Butterworth & Co. 21s. net.

home as well as overseas. The author writes with a cheerful pen upon a subject which does not lightly lend itself to enlivenment. It is a subject in which many members of our Society must take a special interest. Sir Alison Russell pays the *Journal* the compliment of advising draftsmen to study its annual summaries of legislation, wherein valuable precedents are often to be found.

The best of our parliamentary draftsmen in England to-day vary sharply in the extent of their regard for the minor points of form. One prefers to concentrate upon the substance ; another believes that vigilant attention to small matters of form is a necessary foundation. Sir Alison neither disdains the minutiæ nor flinches from the bigger issues. He has something to say on the topic of " legislation by reference," a label which critics sometimes apply loosely. Much law-making everywhere is of an amending character, and all amending legislation must in one sense be referential. Even if the amendment be so designed—perhaps the most convenient and popular plan—as to fit into the framework of the principal enactment by way of verbal addition, substitution or deletion, the interpretation of the result will involve studying two or more overlapping documents together. In spite of that drawback this kind of " legislation by reference " may be less objectionable than that which consists of borrowing the contents of one enactment for the purposes of another—as when large slices of the Municipal Corporations Act were applied to the newly constituted county councils in 1888. These applications are often ingenious and compendious, but the applied features do not always fit the new context without modification. Sometimes an elaborate application clause has to be provided ; sometimes a department is authorized to make the necessary adaptations ; sometimes the task of construction is left to the unaided wisdom of the law-courts. In this last contingency the draftsmen may deserve the judicial scoldings which will probably follow. In general, however, there is much truth in Lord Bramwell's remark that people who draw Acts of Parliament are commonly found fault with by those who never drew an Act themselves. Sir Alison Russell quotes this dictum upon the fly-leaf of his volume. His own experience has been extensive. He has been Attorney-General in a protectorate without a legislative council where the Governor alone enacted the ordinances ; there, he observes, the draftsman's life was calm and reflective. On the other hand, he has held similar office in a colony with a trilingual legislative council where the Government was in a permanent minority ; the account of his adventures in that situation will be read with sympathy. Now that he is Chief Justice of an important Court, there will be at least one member of the bench who can criticize a piece of drafting with full understanding of the draftsman's difficulties, and who will be slow to impute to the draftsman those flaws for which the members of the legislature are to blame.

C. T. C.

PRIZE CASES.[1]

Mr. Hull has confined himself in this book to a very brief analysis of the judgments delivered during the Great War in the Prize Courts of the British Empire. The cases to which reference is made in this digest are arranged alphabetically and much matter has been compressed in a very small compass so as to render it available for departmental use. The developments which the general principles of prize law have received in the last War are well set out, although in a few cases the judgments have been so much cut down that they do not give an exact and adequate statement of the rules of law involved. At the same time, some important matters like armistice and recapture have been entirely omitted, although expressly covered by decided cases. The book is, however, useful as an analytical guide to the cases reported. It is especially valuable as it includes references to many unreported cases, the author having drawn on material contained in the transcripts of the official shorthand writers in the English Courts which was not available to the general public. C. J. C.

A COMPARATIVE STUDY OF MODERN LAWS.[2]

The book is sold to subscribers at the very moderate price of 1 mark a sheet, and the total cost of the completed work is estimated at only about £2 10s. for the four or five volumes.

The general editor is Professor Franz Schlegelberger of Berlin, and he is assisted by a band of learned contributors each of whom speaks for his own country. The English contributor is Professor H. C. Gutteridge. All the articles are signed.

The book will be of immense value to all students of comparative law, indeed so valuable that before long we shall wonder how we ever did without it. The plan is to give in the first volume a general description of the law of each country indicating briefly the sources of the law and the principal texts and authorities. This is supplemented by a bibliography. The first half-volume which has already appeared is devoted to Europe and the second part will cover the extra-European countries. In the subsequent volume the law will be dealt with in detail under titles arranged alphabetically. As an example, we may take the article on adoption by Mr. Eduard Wahl, which is an admirable illustration of the comparative method. It gives briefly but clearly an account of adoption in the Roman, French, German, Swiss, English, Russian and Scandinavian laws, showing where the various laws agree and where they differ. The reader is able to perceive what are the im-

[1] *Digest of Cases decided in British Prize Courts.* By Hubert Hull. London: H.M. Stationery Office, 1927. Pp. xxxviii + 126. Price 21s. net.

[2] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes.* Berlin: Franz Vahlen.

portant points to consider and in what direction the law is moving. It strikes us as a model of what an article in a work of this kind ought to be.

Two parts of vol. 2 have so far been published, coming down to *Allgemeine-Gütergemeinschaft* (complete community of property of spouses).

It may give some idea of the scope of the work to say that the article on Company Law (*Actiengesellschaft*) covers 164 pages closely but clearly printed in double columns.

The value of the work is much enhanced by the fact that each article ends with a bibliography of the law of that matter in the different countries. These strike one as being remarkably up to date. They contain references to the latest books and also to many studies buried away in legal periodicals.

The object is to present *in a comparative manner* the laws of the civilized world, not simply to give a *catena* of different laws. And it is the modern and living law which is dealt with. As the Editor rightly says, comparative law has been rather too much concerned with the customs of primitive peoples. Interesting as such studies may be in the hands of a master it is high time that more attention was paid to comparing the systems in force among peoples who have long ceased to be primitive. There is no work in existence, so far as we know, better calculated than this one to help those who are anxious to get a wide view of modern law in general, of which English law and German law are particular manifestations.

As to English law the only criticism we would make is that Professor Gutteridge's excellent sketch in the general part is much too brief. He has attempted to give in fourteen pages some idea of the systems of law not only of England but of Scotland and of all the British Dominions. The treatment of Scots law is hardly adequate, and it is a pity that Scotland should not have a chapter to itself. If four pages can be given to Albania and as much to Liechtenstein—and we do not say it is too much—surely half a page to Scotland is a very meagre allowance. From the comparative point of view Scots law as standing in a sense half-way between the common law and the civil law is peculiarly interesting.

One suggestion we should like to make. The Editor possibly does not realize that a good many lawyers outside Germany who can read German fairly well do not carry in their heads the German legal terms. *E.g.*, an English lawyer who wished to know how other European laws dealt with sales c.i.f. might very possibly not remember that the German expression was *Abladegeschäft*, or, if he wanted to read about the law of hire-purchase he might be ignorant of the term *Abzahlungsgeschäft*. This difficulty might, to a great extent, be got over by giving (perhaps at the end of each volume) a glossary of equivalent terms in English, or, better still, both in English and French. This would not involve great trouble and it would make the book much more useful to foreign readers.

To review a book like this in the ordinary way is impossible. It would need a reviewer for each country concerned. We can only commend it most heartily to all who are interested in comparative law and wish it every possible success.

F. P. W.

THE DEVELOPMENT OF INTERNATIONAL LAW.[1]

In this work Sir Geoffrey Butler and Mr. Maccoby have performed for international law a valuable service similar to that which Dicey's book on *Law and Opinion in England* rendered to the student of English law. That is to say, they have given us a moving picture of international law set in its proper perspective against a background of practical statesmanship, political ideas and political necessities. On the whole, the point of view is that of the historian rather than that of the lawyer, but therein lies its value. Most practitioners and teachers of international law have to read up their history in scraps to meet their daily needs, and probably there are no lawyers, at any rate in this country, who have a sufficiently wide and deep knowledge of general history to enable them to write such a book as this.

The work does not aim at covering the whole ground, but what we have been given is so good that many readers will wish for more. For example, there is an extremely interesting account of the problem of sovereignty, as it presented itself in the early days of international law, and we should like to see this completed by a discussion of the same problem as presented under modern conditions by such entities as the British Dominions and the mandated territories, or by the restraints which the minority clauses in treaties impose upon state autonomy. Again, we should welcome a treatment of the question of state responsibility for wrongful acts, which is one of the most difficult practical problems of modern times. It has a long history behind it, and in England it is closely connected with the origin and development of our Court of Admiralty. But if more is attempted in the next edition, a second volume will be necessary. Indeed, if a reviewer must find some fault, it is that the material is in many places rather tightly packed.

The authors do not write as partisans of any particular doctrine, but their work will provide good ammunition for the positivists, if that old warfare of the schools can still be kept alive. In the light of history it is difficult to believe in an international law that rests upon first principles and is elucidated by pure reason. On the contrary, we see it continually manipulated and developed with great ingenuity to meet the practical needs of an ever-changing political system. Indeed it would seem that international law is in reality much more flexible than private law, less hampered by doctrine, and much quicker to respond to new conditions.

[1] *The Development of International Law*, by Sir Geoffrey Butler, K.B.E., M.A., and Simon Maccoby, M.A. London: Longmans, Green & Co., Ltd. Pp. xxxv + 566; 25*s*. net.

In private law the complicated machinery of courts, legislatures and codes tends to preserve much that is obsolete, and to throw obstacles in the path of reform. International law, on the other hand, is made directly by those who need to use it, and its reaction to new conditions is often almost unconscious. Undoubtedly this is all to the good. If it were more rigid, it would certainly also be more brittle.

Throughout the book the historical learning shown in the preparation of the material is equalled by the sound judgment which governs the discussion of modern problems, and the lessons of history are drawn into the service of statesmanship.

H. A. Smith.

PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW.[1]

This is an able and learned discussion of two problems which stand *in limine* of international public law: 1. Is there any body of international law outside those rules which are laid down by treaties or are rooted in the customs observed by States acting *inter se*? 2. Is it allowable for a Court or for an arbiter who has to pronounce a decision on an international dispute to make use of conceptions and rules which belong to private law? Until modern times it would not have occurred to anybody to doubt this. For a long period the Roman law was invoked as a sort of common law of Europe, not binding as authority but puissant as *ratio scripta*. At a later stage the "law of nature" was employed to fill up the interstices.

Then came an age of unbelief when the existence of a law of nature was denied. Lorimer, who doughtily upheld the standard, seemed like a seventeenth-century man who had strayed into the modern world. But it soon appeared that the positivists, as the unbelievers were styled, were themselves in difficulties. They turned the law of nature out of the door with contumely, but they let it in by the window under the name of "fundamental principles of justice," or of "reason," or by some other designation. And, indeed, how could it be otherwise? Out of treaties and international customs no coherent system could be constructed. In arbitrations difficult points had to be decided upon which treaties and customs threw no light whatever. What more natural or more proper than that counsel and arbiters, all of them as a rule distinguished lawyers of the different countries concerned, should see if no help could be found in the laws which they had studied.

No doubt there were, and still are, extremists who consider this unjustifiable. Some of them hold that "moral" and "immoral" are terms which cannot be predicated of the actions of States; a State can do no wrong, and the only satisfactory way of settling international

[1] *Private Law Sources and Analogies of International Law.* By H. Lauterpacht. London: Longmans. Pp. 326. Price 25*s.* net.

disputes is a victorious war. Interstate space is a vacuum so far as law is concerned. But Dr. Lauterpacht gives reason for thinking that this extreme view finds less support than it did and the Statute of the Permanent Court of International Justice deals it a shrewd blow:

The Courts shall apply—

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law.

3. *The general principles of law recognized by civilized nations.*

4. Subject to the provisions of art. 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto.

The words of paragraph 3 were, at the instance of Mr. Root and Lord Phillimore, substituted for the term "legal conscience of civilized peoples" which had been originally proposed and which was in effect the term of Rivier, *la conscience juridique commune*, which, according to that writer, is the primary source of all international law.

Dr. Lauterpacht's monograph is to a great extent a commentary on the words of paragraph 3.

The author examines a large number of arbitral awards and shows that in them resort was had to principles of private law such as possession, prescription, estoppel, succession, *res judicata*, and many others. Much of this material is buried in rather out-of-the-way reports and collections, and this book will be extremely useful as a guide to it. It proves conclusively that in practice conceptions of private law have been made use of continually in international disputes. And, surely, to exclude them is to fly in the face of providence. If a rule of law is observed in several systems (with, it may be, some variations), there is a strong presumption that it is supported by reasons of common sense and that it expresses notions of justice which are part of what we call our civilization.

F. P. W.

THE COMMERCIAL CODE OF JAPAN.[1]

THIS translation of the Japanese Commercial Code was completed as long ago as August 1923, but the entire edition was destroyed by fire, whilst the printed sheets were still in the binder's hands. Moreover—and this was the unkindest blow of all—the original manuscript was also consumed in the same holocaust, with the result that the work had to be done all over again. Luckily, Mr. de Becker possesses the gifts of courage and tenacity in a high degree, and was undaunted by a catastrophe which would have completely disheartened the average man.

[1] Translated by J. E. de Becker, D.C.L. London: Butterworth & Co.

This was fortunate because all other translations are out of print, and it is a matter of prime importance to many business men that they should have access to the Japanese Commercial Code in an English garb. This is particularly the case as regards the sections dealing with shipping and insurance, but the thanks of all persons having commercial relations with Japan are due to Mr. de Becker. Comparative lawyers will also find much to interest them in the provisions of the Code, and their special attention may be directed to the Japanese Trust Law of 1922 which is translated in an appendix to the Code. A "trust" (*Shintaku*) is defined as meaning to transfer or otherwise dispose of property rights so as to cause some other person to administer or dispose of it in conformity with a specific purpose. The law is based on Anglo-American legal concepts modified to suit local conditions; for instance, provision is made for the registration of trusts affecting registrable property. A trustee must deal with trust affairs "with the attention of a good manager, and agreeably to the intent and purpose of the trust," and generally speaking the law follows along the lines of our own law of trusts. It is probably not realized by Anglo-American lawyers that the institution of the trust is becoming well known abroad, and that it is gradually penetrating into systems which owe allegiance to the Civil Law. Thus the exigencies of commerce have rendered it necessary to modify Italian law to such an extent as is required to give effect to trusts of a commercial character and further movements in the same direction in continental law are by no means improbable. Mr. de Becker has rendered a real service not only to the business world, but to the cause of the advancement of legal science in making Japanese law known to those to whom it would otherwise be a sealed book, and we hope that the publication of the present volume will not be the last of his achievements.

H. C. GUTTERIDGE.

THE NON-PARTISAN LEAGUE.[1]

MR. BURGESS is an American economist who presented the work under review as a thesis for the doctorate of the University of Lyons. It deals with the history of the league of non-partisan farmers founded in North Dakota in 1916, which succeeded in obtaining a majority in the State Legislature and embarked on what was virtually an experiment in agrarian socialism. An elaborate system was set up including State grain-elevators, flour-mills, abbattoirs and a State agricultural bank. The legality of this procedure was challenged in the Courts on the ground of unconstitutionality, though at first without success (*Green* v. *Frazier*, 253 U.S., p. 233, and *Scott* v. *Frazier*, *ibid.*, p. 243); but ultimately in 1925 the objects of the league received a severe

[1] *La "Nonpartisan League."* Par Eugene W. Burgess. Bibliothèque de l'Institut de Droit Comparé de Lyon. Paris: Marcel Giard, 1928. Pp. xii + 244. Price 28 frs.

check when the North Dakota Grain Company Act was declared to be unconstitutional as violating the "Commerce Clause" of the Federal Constitution (*North Dakota* v. *Farmers' Grain Co.*, 268 U.S. 189). Whether the programme of the league can be said to have met with success or not is a matter of acute controversy; but those who desire a clear and concise account of this interesting phrase of economic, political and social life in the middle western States will be well advised to consult Mr. Burgess's treatise. It is written from a scholarly and impartial point of view, which is more than can be said of most of the works which have hitherto appeared on the subject.

H. C. GUTTERIDGE.

We have to acknowledge:

Justice and Administrative Law. A Study of the British Constitution. By William A. Robson, Ph.D. (London: Macmillan & Co.) Pp. xviii + 346. Price 12*s.* 6*d.* net.

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